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165
OFFICIAL EDITION

Jul. 26

REPORTS OF CASES

HEARD AND DETERMINED IN THE

APPELLATE DIVISION

OF THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

MARCUS T. HUN, REPORTER.

VOLUME XCII.

1904.

J. B. LYON COMPANY,
ALBANY, N. Y.

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The attention of the profession is called to the fact that the Court of Appeals in many cases decides an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 131 N. Y. 490.)—REP.

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SECOND DEPARTMENT

IN THE

APPELLATE DIVISION,

March, 1904.*

In the Matter of the Judicial Settlement of the Account of THE LONG ISLAND LOAN AND TRUST COMPANY, as Substituted Trustee under a Trust for the Benefit of LILLIE G. SLOAN, Created by the Last Will and Testament of STEPHEN GARRETTSON, Deceased, Respondent.

LILLIE G. SLOAN, Appellant.

Trust—transfer by a trustee of a mortgage owned by him, to the trust fund—it is against public policy—effect of a report by the trustee showing such investment—what is essential to a ratification—when a decree on an accounting by the trustee does not, nor does the denial of a motion to open it, estop the cestui que trust.

The directors of the Long Island Loan and Trust Company, which in its individual capacity was the owner of a bond and mortgage executed by one Donohue and was also a trustee of certain personal property for the benefit of Lillie G. Sloan, passed the following resolution: "*Resolved*, That in consequence of the difficulty of procuring satisfactory bonds and mortgages for the uninvested funds held by this Company as Trustee, &c., the following bonds and mortgages, being the property of the Company, shall, after the first of February next, be held for the different trusts, as named below, viz.: Bond of T. Donohue, No. 3, amount, \$7,800, for the Trust of Lillie G. Sloan."

No other transfer of the mortgage was made to the trust fund created for the benefit of Lillie G. Sloan. Thereafter the Long Island Loan and Trust Company brought an action in its own name for the foreclosure of the mortgage and on the foreclosure sale purchased the mortgaged property in its own name.

Held, that the transaction on the part of the trustee in attempting to transfer the mortgage to the trust fund was contrary to public policy;

*The other cases of this term will be found in volume 91 App. Div.—[REF.]

2 MATTER OF L. I. L. & T. CO. (IN RE GARRETSON).

SECOND DEPARTMENT, MARCH, 1904.

[Vol. 92.]

That a trustee cannot deal, in his own behalf, with the funds of his *cestui que trust*;

That he can neither purchase the trust funds for himself nor exchange them for his own property;

That the *cestui que trust* was entitled to an adjudication that the mortgaged property belonged to the trustee and that the trust fund be made good with interest at six per cent less any income which might have been paid to her;

That a statement in the report made by the trustee to the *cestui que trust* in which the following entry appeared: "February 1, 1893, L. I. L. & T. Co., T. Donohue Mtge. No. 3, \$7,800," did not operate as a ratification of the transaction by the *cestui que trust*;

That where ratification on the part of a *cestui que trust* is set up, it must appear not only that the *cestui que trust* knew all of the facts, but that she had been informed of her rights under the law; that she had been told of the disposition which a court of equity would make under the known facts;

That if the trustee claimed that a decree rendered on a prior accounting by him estopped the *cestui que trust* from attacking the transaction in question upon the subsequent accounting, it was incumbent upon the trustee to show that the question at issue was litigated and determined on the previous accounting;

That, in the absence of such proof, neither the previous decree itself nor the denial of a motion made by the *cestui que trust* to open such decree operated to estop the *cestui que trust* from attacking the unauthorized action of the trustee, although the *cestui que trust* had, on the motion to open the decree, set up the unauthorized action of the trustee;

That the motion to open the decree was addressed to the discretion of the surrogate, and that the denial of such motion did not affect any substantial right of the *cestui que trust*.

APPEAL by Lillie G. Sloan from a decree of the Surrogate's Court of the county of Kings, entered in said Surrogate's Court on the 27th day of May, 1903, settling the account of the respondent and overruling the appellant's objections thereto.

Charles D. Ridgway, for the appellant.

George S. Ingraham, for the respondent.

WOODWARD, J.:

Stephen Garretson, by his last will and testament, created a trust fund for the benefit of Lillie G. Sloan, and upon her death the trust fund was to be divided among her children. The Long Island Loan and Trust Company is the substituted trustee, and this appeal is from a decree made in an intermediate accounting by the trustee, whereby the trustee's account covering the period from June 20, 1898, to February 28, 1903, was sustained "in every respect." The

life tenant objected to the account, and urged before the learned Surrogate's Court that a certain piece of real estate known as No. 1459 Fulton street, Brooklyn, inventoried by the trustee in its account at \$9,106.61, be adjudged to be the property of the trustee, and the trustee be adjudged to repay to the trust fund the amount at which it is inventoried, with interest at six per cent from the time of the foreclosure, less such income therefrom as may have been paid to the appellant.

It seems that the principal of this trust fund amounts to \$28,556.63, and that when it came into the hands of the present trustee in 1889 it was all invested in bonds and mortgages. On the 4th of June, 1888, the present trustee, in pursuance of its own business, had made six mortgage loans of \$8,000 each to Thomas Donohue on six four-story houses, erected on lots twenty by one hundred feet, situated on the southerly side of Fulton street, just east of Brooklyn avenue. With these mortgages in its possession, the executive committee of the board of trustees of the Long Island Loan and Trust Company in 1893 adopted the following resolution: "*Resolved, That in consequence of the difficulty of procuring satisfactory bonds and mortgages for the uninvested funds held by this Company as Trustee, &c., the following bonds and mortgages, being the property of the Company, shall, after the first of February next, be held for the different trusts, as named below, viz.: Bond of T. Donohue, No. 3, amount, \$7,800, for the Trust of Lillie G. Sloan,*" etc.

There appears to have been no other transfer of this mortgage to the trust fund created for Lillie G. Sloan, and the life tenant urges with great force that, assuming this to have been a sale to the trust by the trustee, it is in violation of the public policy of this State, which forbids a trustee dealing with the trust estate both as buyer and seller. Subsequent to this resolution, which did not convey the mortgage to the trustee, and on the 7th day of August, 1894, the Long Island Loan and Trust Company began an action for the foreclosure of this mortgage in its own name and not as a trustee. Judgment of foreclosure and sale was entered November 12, 1894, and on the 11th day of December, 1894, the mortgaged premises were sold at public auction by the sheriff of Kings county, and purchased by the Long Island Loan and Trust Company, and the same were transferred to the said company in its own right in fee simple

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and not as trustee. What the life tenant demands, and what she is entitled to if she is not estopped to assert her rights, is that this piece of property shall be adjudged to belong, as it does, to the trustee, and that the trust fund shall be made good, with interest at six per cent, less any income which may have been paid to the life tenant. The transaction on the part of this trustee, no matter what degree of good faith may have been back of the resolution of 1893, is counter to public policy. Trustees cannot be permitted to deal with trust funds in the dual capacity of buyer and seller. It has long been settled, and upon principles which cannot be controverted, that a trustee cannot deal in his own behalf with the funds intrusted to his charge for the benefit of another. He can neither purchase the trust funds for himself, nor exchange them for his own property. (*Ackerman v. Emott*, 4 Barb. 626, 649; *Smith v. Howlett*, 29 App. Div. 182.)

It does not appear to be seriously contended that the trustees had a right to deal with the trust fund in the manner which it is agreed was done, but it is urged that the life tenant has ratified the action of the trustee, or has been estopped by a former decree. It appears that in 1893 the trustee made a report to her in which appears this entry: "February 1, 1893, L. I. L. & T. Co., T. Donohue Mtge. No. 3, \$7,800." Just how this was calculated to give the life tenant notice of the state of facts which is now developed, it is difficult to understand, and we are clearly of the opinion that it did not serve any such purpose. Where ratification on the part of a *cestui que trust* is set up, it must appear not only that the *cestui que trust* knew all of the facts, but that she had been informed of her rights under the law; that she had been told of the disposition which a court of equity would make under the known facts. (*Smith v. Howlett*, *supra*, 190, citing *Adair v. Brimmer*, 74 N. Y. 539, 554.) There was no ratification on the part of the life tenant, and we are persuaded likewise that the decree of June 21, 1898, is not a bar to this appeal.

The trustee accounted in 1898, but none of the questions here raised was put in issue in that proceeding, and the decree on that accounting discharged the trustee only as to the assets directed to be distributed thereunder and the amount of the trust estate. As the trustee claims this decree to have worked an estoppel, the

burden of proof is upon the trustee to show clearly that the question in issue in this case was litigated and determined in the former proceeding (*Rudd v. Cornell*, 171 N. Y. 114, 127, and authority there cited), and having failed to show this, the life tenant is not estopped to assert her rights at this time. Nor is the position of the trustee changed by the fact that the life tenant made a motion in May, 1903, to open the decree of August, 1898, in which the matters here involved were set up as a reason for opening the former decree. The opening of the former decree rested in the discretion of the learned surrogate, and as the former decree did not attempt to settle any of the questions which were urged on this motion, the denial of the motion did not affect any substantial right of the life tenant, and, under well-established rules, it could not work an estoppel on this accounting. (*Dutton v. Smith*, 10 App. Div. 566.)

The decree should be reversed and the life tenant should be given the relief demanded.

Ali concurred, except JENKS, J., taking no part.

Decree of the Surrogate's Court of Kings county reversed and proceedings remitted to that court for settlement of the estate in accordance with the opinion of WOODWARD, J.

In the Matter of the Judicial Settlement of the Account of THE LONG ISLAND LOAN AND TRUST COMPANY, as Executor of the Last Will and Testament of DANIEL W. NORTHUP, Deceased, Appellant. DWIGHT NORTHUP, Appellant; AMY NORTHUP and DANIEL W. NORTHUP, JR., Respondents.

Surcharging an executor's account — a claim due to the estate lost by accepting for it real property with a defective title — delay in enforcing a claim until the Statute of Limitations has run against it — a clause of a will bequeathing a law business, books "and all property pertaining to my business" does not include a debt due to the testator for legal services — costs, when imposed upon an executor individually.

On an accounting by the executors of Daniel W. Northup, a practicing lawyer, who died June 9, 1898, leaving a will by which he appointed the Long Island Loan and Trust Company his executor, it appeared that Northup and one Veeder had represented the Stewart estate in a litigation; that proceedings for

the settlement of the litigation were in progress at the time Northup died; that, pending negotiations for the settlement of the litigation, Northup and Veeder had a conversation, in which they agreed to accept the sum of \$4,500 for their compensation, of which Northup was to receive \$3,000 and Veeder was to receive \$1,500; that Northup informed Veeder that the Stewart estate offered to convey, in part satisfaction of their claim, property known as the Clifton place, valued at \$3,500; that Veeder expressed his willingness, if paid \$1,000 in cash, to take a \$500 interest in the real estate; that four days after Northup's death the parties to the litigation entered into an agreement of settlement, providing, "that there shall be paid to D. W. Northup, attorney for the contestants of said will of 1887, and William D. Veeder of counsel for their services up to and including settlement, the sum of four thousand and five hundred dollars;" that thereafter the Stewart estate paid \$1,000 in cash, which was taken by Veeder, and conveyed the Clifton property to one Dooley, who executed a declaration that he held the same in trust for Veeder and the estate of Northup in the proportion of one-seventh and six-sevenths respectively; that the conveyance to Dooley was made with the consent of Northup's executor; that the title to the property conveyed was unmarketable and that that fact could have been discovered by Northup's executor with the exercise of reasonable care, but that no examination of the title was made.

It did not appear that Northup knew the condition of the title at the time he consented to take it in part satisfaction of his claim.

Held, that no adequate excuse existed for the action of the executor in accepting the Clifton place, without any proper examination of the title thereto, in satisfaction of the debt, and that the executor's accounts should be surcharged with the \$3,000 which the estate had lost thereby.

It further appeared that at the time the testator died one Vosburgh was indebted to him in a considerable sum for legal services; that although this claim was mentioned in the inventory and was collectible the executor had made no effort to collect it and that the claim was at the time of the executor's accounting barred by the Statute of Limitations.

Held, that the executor's account was properly surcharged with the amount of this claim;

That Northup's claims against the Stewart estate and against Vosburgh for legal services did not pass under a clause of his will providing, "I give and bequeath to my son Dwight all my law business, law books, papers, safe, bookcases and office furniture, and all property pertaining to my business;"

That it was not improper for the surrogate, in the exercise of his discretion, to direct that the costs of the proceedings should be borne by the executor personally;

That, as a general rule, if an executor denies the existence of assets and such assets appear he will be personally charged with costs.

APPEAL by The Long Island Loan and Trust Company, as executor, etc., of Daniel W. Northup, deceased, and another, from a decree of the Surrogate's Court of the county of Kings, entered in

said Surrogate's Court on the 22d day of October, 1902, judicially settling the accounts of said executor.

Joseph A. Burr, for the appellant trust company.

Dwight Northup, appellant, in person.

Augustus Van Wyck, for the respondents.

HOOKER, J.:

Daniel W. Northup died on the 9th day of June, 1893, a practicing lawyer in the city of Brooklyn, leaving a last will and testament, in and by which he named the Long Island Loan and Trust Company as his executor; the will was duly probated by the surrogate of the county of Kings on the 13th day of September, 1893; the executor qualified and ever since that time has been acting as such. No accounting was ever had until the present proceeding. On the 3d day of July, 1900, the executor, by its secretary, verified a petition, praying that its account might be judicially settled. This was presented to the surrogate and was met with several objections, by William J. Courtney, as special guardian of two of the infant children of the deceased. Upon the matters in difference thus defined, a mass of testimony was taken, and the surrogate has surcharged the account of the executor with several thousand dollars. From the decree entered upon the findings of the surrogate, the executor and Dwight Northup, a son, have taken this appeal.

But three of the items of the executor's account are now open to dispute. The first is that known as the "Stewart" claim. In the year 1888 one James Stewart died, and his son filed a petition for the probate of a paper, dated in 1881, which purported to be the will of the deceased Stewart, and at the same time one Allaban filed a petition for the probate of another paper, dated in 1887, which purported also to be the last will of the deceased Stewart. Daniel W. Northup, the testator here, with William D. Veeder, as counsel appeared in these proceedings for James C. Stewart and others, and rendered legal services which covered a number of years and involved a large amount of arduous labor. The deceased and Veeder had been paid a considerable sum of money on account of their services in this matter; the litigation went through the late General Term, and was decided once in the Court of Appeals, and

pending the contest, the widow of James Stewart died, leaving a will which was duly admitted to probate and letters testamentary issued thereon. After the widow died, the parties to the old contest agreed among themselves to avoid further litigation and expense, and to settle the matters in difference between them. A written agreement was drawn, dated the 1st day of June, 1893, signed by the parties interested in the estate of James Stewart, deceased, and acknowledged June 13, 1893, four days after the death of the testator in these proceedings. By this agreement it was determined and agreed between the parties what their several and individual interests in the estate of their testator should be, and the manner in which some of it should be turned over to the legatees. In that agreement appeared this clause: "That there shall be paid to D. W. Northup, attorney for the contestants of said will of 1887 and William D. Veeder of counsel, for their services up to and including settlement, the sum of four thousand and five hundred dollars." The proof introduced by the special guardian established that when this agreement was acknowledged, and for some time after the death of Mr. Northup, the estate of Stewart was solvent and well able to pay this claim of \$4,500 in favor of Messrs. Northup and Veeder in full. On the 1st day of July, 1893, the executor of the Stewart estate conveyed a house and lot on Clifton place to one Dooley, who thereupon declared a trust in writing by which it was made to appear that he held title to the premises as trustee for the benefit of the estate of Daniel W. Northup, deceased, and of Mr. Veeder, the interest of the latter appearing to be one-seventh and of the former six-sevenths of the whole property. About that time \$1,000 was paid in cash by the executor of the Stewart estate, which was taken by Mr. Veeder to apply on his interest of \$1,500 in the \$4,500 indebtedness of the Stewart estate to the deceased Northup and himself. Upon this accounting Mr. Veeder testified in relation to the talk between himself and the testator as to their compensation, as follows: "We (Mr. Daniel W. Northup and the witness) agreed upon the amount of compensation between us for the conclusion of the matter with the compromise and settlement with the parties Allaban and others, who were contesting the probate of the will that was admitted to probate, and after some conversation between us we agreed to accept the sum of \$4,500 for our

compensation, of which Mr. Northup was to receive \$3,000, and I was to receive \$1,500. Mr. Courtney: Q. In what form were you to receive that? A. I think we had several conversations. Mr. Courtney: I have a right to know when this conversation took place. *This conversation must have been before that agreement was signed.* The conversation in regard to compensation was: Mr. Northup told me that there wasn't personal estate enough to pay us in cash, and he wanted to know how much — we had agreed upon the amount, and he wanted to know how much I wanted in cash, as there was some cash, and I told him I thought I ought to get \$1,000 in cash. He told me they offered a piece of real estate at \$3,500, I think, and I told him that I was willing, if I was paid the \$1,000 in cash, to take \$500 interest in the real estate, and I suggested to him that the property be conveyed to some trustee to hold for the benefit of himself and myself. It may be that we didn't agree upon that. It is possible that I took the title myself, and then sell it and give me my \$500. He said he would accept the property at \$3,500 if I would in that proportion. I was to have \$500 and he was to have \$3,000. That is the Clifton place property which was subsequently conveyed to Mr. Dooley. Mr. Dooley took the title."

It thus appears that the conversation between Messrs. Northup and Veeder in relation to the amount of their compensation to and including the settlement of the Stewart litigation, and the manner in which it should be paid, occurred before the agreement, from which we have quoted, was signed; that agreement, executed by the heirs of the Stewart estate, acknowledged in terms an indebtedness in this matter of \$4,500, and thereafter the declaration of trust by Dooley was delivered to the attorney for the appealing executor, by him recorded, and the property on Clifton place was transferred to Dooley for the benefit of the estate it was administering *with its positive consent*. The title to the Clifton place premises is, however, conceded by all parties to be unmarketable for reasons it is unnecessary here to discuss. It is clear that this condition of the title could have been discovered by the executor at the time Mr. Dooley took the title with the exercise of reasonable care. There is evidence, however, tending to show that no examination of the title was made by any one at that time. Efforts have been made to dispose of this

realty at the instigation of the appealing executor, Mr. Veeder and Mr. Dooley, but they have all been unsuccessful on account of the condition of the title, and it seems to be impossible to straighten this title out during the lifetime of certain heirs at law and legatees of Stewart, deceased. The excuse which the executor offers for its consent to receive this Clifton place property in lieu of cash from the Stewart estate, is that its testator had stated to Veeder and Breaznell, managing clerk in the deceased's office, that he was willing to accept the Clifton place property for \$3,500 of the claim, inasmuch as there was not money enough in the estate to pay the cash. At the same time he said, however, that he would rather have the money than the property, and this was prior to the preparation and execution of the written contract or agreement of settlement between those interested in the Stewart estate. Nothing appears in the voluminous record before us which even tends to indicate that the deceased proposed to take a piece of property whose title was not marketable, or that the condition of the title had been called to his attention, and it is hardly to be believed that had the testator lived he would have consummated an arrangement by which he would be so likely to lose the benefit he was seeking to derive as compensation for the arduous services he had rendered in the Stewart will case.

But aside from that, there was no binding agreement or understanding of any kind between the testator and the representatives of the Stewart estate that the Clifton place property should be taken by Northup and Veeder in part payment of the services to which they were entitled. On the contrary, it appears that subsequent to the talk between the deceased and Veeder, in which the former suggested the taking of this property, he prepared an agreement between those interested in the Stewart estate, ultimately signed by all of them, in which it was distinctly provided that the estate was indebted to Northup and Veeder in the sum of \$4,500, and no mention is made there of the Clifton place property and no reference pointed to any other understanding, suggestion or contract that the debt was to be paid by any other commodity than cash. All the facts here stated could readily have been ascertained by the executor of Mr. Northup's will if it had taken any steps to ascertain the truth in relation to the indebtedness of the Stewart estate to Northup,

and we can find no adequate excuse anywhere in the record for the acceptance of real property in satisfaction of this debt. "Land should not be taken in payment of debts if its proceeds may be had instead." (Schouler Executors [3d ed.], § 310.) This principle is so well settled that it seems hardly necessary to cite further authorities in support thereof. In view of this rule, and in face of the obvious provisions of the written agreement, we are constrained to agree in the result reached by the learned surrogate, that the \$3,000 which the estate has lost by reason of the conduct of the executor should be surcharged against its account.

The indifference of the executor toward this Stewart item is further evidenced by the negligent manner in which it has dealt with it since Dooley actually took the title and declared his trust in favor of Northup's estate and Mr. Veeder. Dooley collected rents for four years, and although there is in his hands a considerable balance of these rents, after paying lawful charges, the executor has never made any effort to collect this balance from him. And the same appears to be true of Mr. Veeder, who has since 1897 collected the rents; he has in his hands a considerable sum of money as proceeds of the rent.

The learned surrogate has found that \$3,000, the share of the estate of Daniel W. Northup, deceased, in the claim of \$4,500, could have been collected by the executor of the will of Daniel W. Northup, deceased, within one year after its appointment as such executor. There is abundant evidence to support that finding of fact and it cannot be disturbed on this appeal.

The second item of the executor's account in controversy is an indebtedness from one Vosburgh, to the deceased, for services rendered by the latter in his profession as a lawyer during his lifetime. Wright Duryea and William Duryea commenced an action against William C. Vosburgh in the year 1886 and the testator was retained and appeared for the defendant. This litigation was hard fought and extended over a period of time from the date of the commencement of the action until after the testator's death. On the first trial the jury disagreed; the second trial resulted in a verdict for the defendant. The late General Term affirmed the judgment entered upon the verdict, and on appeal to the Court of Appeals that court reversed the judgment and ordered a new trial. The

third trial likewise resulted in a verdict for the defendant, and from the judgment entered thereon, appeal again was taken to the General Term, which affirmed the judgment. The plaintiffs, unsatisfied, carried their case a second time to the Court of Appeals. Shortly before Northup died and in April, 1893, the judgment was again reversed by that court. The case was not tried again; Mr. Vosburgh died in 1895, and his executors two years later settled with the plaintiffs for the sum of \$2,000. The claim originally was for \$6,000, which with interest from June 1, 1881, brought the alleged damages, at the time of the settlement, up to about \$12,000. Of the fact that the testator rendered extremely valuable services to Mr. Vosburgh there can be no doubt; one of the witnesses called by the special guardian has testified that the fair value of the legal services was \$2,500, and this is not denied; in his lifetime there was paid to Northup the sum of \$534.32, and that the balance of \$1,965.68 could have been collected from William C. Vosburgh within one year after the issuance of letters testamentary to the executor, the surrogate has found as a fact. Both Vosburgh and his estate were solvent, and this finding is supported by the evidence; we are far from an inclination to interfere with it. The learned surrogate has also found that the executor has exercised no diligence in the collection of this claim, and inasmuch as the claim is now barred by the Statute of Limitations, all benefit to the estate from the services rendered by Northup in his lifetime to Vosburgh in the matter of this litigation is, therefore, lost. It does not appear that at any time within the seven years which elapsed between its qualification and the accounting, the executor made any appreciable effort to collect from Mr. Vosburgh or his estate remuneration for the services Northup rendered, and this although there appeared in the inventory an item of \$1,687.87 costs in "*Duryea v. Vosburgh*, * * * suit still pending." The executor seemed to have been lulled to sleep by the statement of Breaznell, who had been managing clerk for Mr. Northup in his lifetime, that the judgment had been reversed in the Court of Appeals. A most casual examination could not have failed to disclose to the accounting executor a large amount of labor spent by the deceased in the conduct of this litigation; the law register of Mr. Northup showed it, and counsel for the defendant, as well as the attorney for the plaintiffs and the plaintiffs them-

selves, would doubtless have corroborated the showing made by the register.

Upon the trial below the executor seems to have abandoned its theory that it was not negligent and has sought to show a full payment of this item by Vosburgh before his death. We have examined the proof in this particular and are convinced that there is no such preponderance of the evidence showing that Mr. Northup had been paid in full as to call for a reversal of the surrogate's disposition of that item.

The only other item in dispute is that of eighty-eight dollars, paid by the executor to Joseph Breaznell for legal services. It clearly appears that, in the service for which he was paid this sum, Breaznell was employed by Stewart A. Robinson, the executor of the Stewart will before referred to, and Breaznell testified that whatever he did with reference to the settlement was performed for the executors of the Stewart estate, and *not* for the estate of Northup, and that the attorney for this executor "left the closing to me, for I was acting for Stewart A. Robinson, * * * and I represented the Stewart estate *only* on this settlement." The learned surrogate was, we think, quite correct in holding that the executor's account should be surcharged with this item, for it appears to be paid for legal services to a lawyer who was representing adverse parties.

This discussion leaves but one further matter to notice. Dwight Northup, the eldest son of Daniel W. Northup, deceased, a child by the latter's first wife and a legatee and residuary beneficiary named in the will, has appealed from the decree of the surrogate, and makes the point that the claims for compensation for services which existed in favor of the deceased in his lifetime against the Stewart estate and Vosburgh passed to him under the will, and hence the appealing executor properly has had nothing to do with their collection, and no obligation rested upon it to exercise any degree of care or diligence in respect thereto. It is very clear that Dwight Northup, appellant, and the executor, appellant, have adopted this view of the will but recently, and we think their former notion in respect to it was correct. The 3d clause of the will reads as follows: "*Thirdly*: I give and bequeath to my son Dwight all my law business, law books, papers, safe, bookcases and office furniture, and all property pertaining to my business. Also my stock certificate

in the Brooklyn Law Library, and the Ten Shares of Stock in the Lawyers' Title Insurance Company now pledged to the Company." The person named in that clause asks us to hold as matter of law that the two claims for legal services existing against the Stewart estate and against Vosburgh passed to him by reason of that clause. These debts were not mentioned in the clause, and it is impossible for the legatee named therein successfully to claim them, except on the theory that it was a devise by implication. It is said, however, that a gift by implication will only be adopted where the probability of such intention is so apparent that the contrary cannot be supposed to exist. (*Post v. Hover*, 33 N. Y. 593.) There is here nothing to support a claim for such contrary intention; the son, Dwight, had not been admitted to the bar at the time of the preparation of the will, and was not admitted until some considerable period of time after his father's death. There is nothing to indicate a reason for any purpose in the mind of the testator to devise choses in action by language which describes choses in possession. The last will and testament of the deceased Northup was prepared by himself, a lawyer of large experience, and it may be presumed that he knew the effect generally of omitting to describe property the subject of devise. (*Walter v. Ham*, 68 App. Div. 381, 383.) *Matter of Reynolds* (124 N. Y. 388) is an authority against the contention of Dwight Northup upon this proposition. The testator there devised and bequeathed to his son certain real property upon which there were buildings, "including all the furniture and personal property in and upon the same, or in any manner connected therewith." The testator's office was on the property so devised, in which there was a vault containing money and securities, found upon his death. The Court of Appeals held that these securities were not bequeathed to the son under the provisions of the will, and, Judge PARKER speaking, said (p. 397): "We have now referred to the cases cited by the learned counsel for the appellant in support of his contention, and it will be observed that in every case, excepting *Hotham v. Sutton** and *Michell v. Michell*,† in which the court held that the general words preceding or following enumerated articles should not be limited to things *ejusdem generis*, they either occurred in a

* 15 Ves. Jr. 319.

† 5 Mad. 69.

general bequest of the whole of testator's estate, in a residuary clause, or the will did not contain a residuary disposition. With the exceptions thus noted, it seems to be a settled rule of construction that when certain things named are followed by a phrase which need not but might be construed to include other things, it will be confined to articles of the same general character as those enumerated. (*Johnson v. Goss*, 128 Mass. 434; *Dole v. Johnson*, 3 Allen, 364; *Spark's Appeal*, 89 Penn. 148*.)"

The surrogate directed that the costs and expenses of this proceeding should be borne by the executor personally, and it is asked that we modify the decree so that it may be relieved of this burden. It was in the discretion of the learned surrogate whether the executor should be charged personally, and unless there has been an abuse of that discretion we may not interfere. (*Matter of Selleck*, 111 N. Y. 284.) We are not convinced that the surrogate abused his discretion; as far as the Vosburgh and the Stewart matters were concerned the executor has acted with great laxity and almost inexcusable negligence, although there is no intimation of any improper motive. Generally speaking, an executor will be directed personally to pay the costs where he denies assets, and they appear. (*Estate of Mull*, 16 N. Y. St. Repr. 981.)

The decree of the surrogate is in all respects proper and should be affirmed.

All concurred, except JENKS, J., not sitting.

Decree of the Surrogate's Court of Kings county affirmed, with costs.

* *Spark's Appeal* (89 Penn. St. 148).

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM F. McCABE and JOHN DUFFY, Respondents, v. CHARLES A. MATTHIES and Others, as the Board of Town Auditors of the Town of White Plains, Appellants.

Audit by a town board—what constitutes an audit—the remedy where there is an error in the audit is by certiorari—a mandamus is improper—test as to whether there has been an audit.

Contractors for the construction of a road in a town, having used more stone than they had contemplated would be necessary, filed a claim with the town board for the value of the extra stone. The town board having refused to audit the claim, the contractors procured a peremptory writ of mandamus requiring them to do so. Pursuant to the writ the town board met and the town clerk produced the record touching the matter in controversy together with the original notice of claim. The terms of the contract were then discussed and a motion was carried that the board take action. The record read as follows: "Mr. Haley: I move that the claim be rejected on the ground that it is not a legal claim against the Town of White Plains, and if any extra work was done it is in violation of the express terms of the contract. Seconded by Mr. Matthies. Motion carried. Mr. Haley: I move that if there is nothing further to come before the Board we adjourn. Seconded by Mr. Matthies. Motion carried."

Held, that the action of the town board was a determination upon the merits of the claim and constituted a legal audit thereof (BARTLETT, J., dissented);

That the remedy of the contractors was by a writ of certiorari to review the town board's determination of the legal question of liability, and if the town board had committed error to have the claim remanded to that board for audit;

That an application, after the rejection of the claim, for a writ of mandamus to compel the town board to audit the account, resulting, under an alternative writ, in an assessment by a jury of the amount of the contractors' claim and a peremptory writ of mandamus directing the town board to audit and allow the claim at that amount, was not the proper remedy.

In auditing a claim the town board acts in a quasi-judicial capacity, and the test whether the action of the town board constitutes a legal audit of the claim depends upon whether they have placed such action upon a decision of the merits of the controversy.

If a town board has made a legal audit of a claim the court has no power, by mandamus, to correct any error therein, whether the error is on account of a total rejection of the claim based upon a misconception of the legal questions involved, or whether it is because they have allowed the claim at too great or too small a figure.

Mandamus may not be invoked to review a judicial or quasi-judicial decision.

APPEAL by the defendants, Charles A. Matthies and others, as the board of town auditors of the town of White Plains, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 1st day of November, 1902, granting a peremptory writ of mandamus, and also from an order bearing date the 27th day of October, 1902, and entered in said clerk's office, denying the defendants' motion for a new trial made upon the minutes, with notice of an intention to bring up for review upon such appeal an order entered in said clerk's office on the 15th day of May, 1902, granting an alternative writ of mandamus herein.

Henry T. Dykman for the appellants.

L. Laflin Kellogg [*Alfred C. Petté* with him on the brief], for the respondents.

HOOVER, J. :

The town of White Plains entered into a contract with the relators for the improvement of certain roads in that town outside the village of White Plains. In doing this work they used several thousand cubic yards of stone more than they had contemplated would be necessary at the time the contract was made, and for the value of this stone filed a claim with the town board of the town of White Plains, which is by statute the board of town auditors. This body refused to audit the claim, and the relators procured a peremptory writ of mandamus directing its examination and audit. The appellants, pursuant to the mandate of the writ, met as the town board of the town of White Plains, and the town clerk produced the record touching the matter in controversy, together with the original notice of claim, dated October 1, 1901, verified by the relators, and the terms of the contract between the relators and the town were by the board then discussed. A motion was carried that the board take action, and the record shows that the following proceedings were had: "Mr. Haley:—I move that the claim be rejected on the ground that it is not a legal claim against the Town of White Plains, and if any extra work was done it is in violation of the express terms of the contract. Seconded by Mr. Matthies.

Motion carried. Mr. Haley:—I move that if there is nothing further to come before the Board we adjourn. Seconded by Mr. Matthies. Motion carried.”

After this rejection the relators moved for an alias writ of peremptory mandamus, and this motion coming on to be heard and affidavits being presented by the respondents therein which raised issues of fact the court directed that an alternative writ issue to which latter a return was made by the board, and the issues thus framed were tried before a jury which found its verdict for a large sum of money in favor of the relators. Upon this verdict a motion was granted that a peremptory writ of mandamus issue, and later such writ was issued by the court commanding the respondents as the board of town auditors of the town of White Plains to audit and allow to the relators a sum equaling the verdict of the jury for furnishing broken stone, and also directing them to audit and allow to the relators or their attorneys, a sum therein stated as costs, disbursements and allowance of proceedings and directing them to make return of the writ pursuant to law.

Upon the rendition of the verdict by the jury the appellants moved for a new trial, and that motion was denied. They have appealed to this court from the order granting the final peremptory writ of mandamus, from the order denying the motion for a new trial, and further gave notice that they would bring up on said appeal for review the order granting the alternative writ of mandamus.

One of the questions presented for our consideration is whether the relators have pursued the proper remedy in their efforts to procure by the town board the allowance of the claim which they allege should be paid by the town. It is urged by the appellants that the relators have mistaken their remedy, and that the only manner in which the action of the town board may be reviewed is by a writ of certiorari. In this view we must concur.

When sitting as auditors of claims presented against the town, the town board acts in a quasi-judicial capacity, and is pursuant to the statute the only body which may audit certain classes of claims against towns. (Town Law [Laws of 1890, chap. 569], § 162, as amd. by Laws of 1897, chap. 481; *Bragg v. Town of Victor*, 84 App. Div. 83.) The claim of the relators is within those

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classes, and the town board is the only tribunal to which they may have resort to enforce the claim. The section of the Town Law (*supra*) directs the town board to audit and allow or reject all claims and demands against the town, and it follows that "In case of refusal by the board to act, mandamus may compel action." (*Bragg v. Town of Victor, supra.*) If it is held that the town board in this case has in fact acted in the premises in the manner contemplated by the statute, or has made a legal audit of the account presented by the relators, the courts are without power by mandamus to correct an alleged erroneous audit, whether such error of the town board may happen to be on account of a total rejection of the claim based upon a misconception of the legal questions involved, or whether an allowance of the claim may be for an insufficient, or too great an amount. We are of the opinion that, in reason and under the authorities, it is clear that the town board has actually made a legal audit of the account of the relators and has exercised true judicial functions in rejecting the demand against the town, which they considered pursuant to the first writ of mandamus granted in favor of the relators. It is to be noted that the town board met for a consideration of this subject; that it caused to be brought before it the original claim of the relators, and the contract under which the relators had performed the work for the town and under which the claim for the extra stone was made; that after consideration a motion was put and carried that the board take action, and that the rejection was placed distinctly upon the ground that the town was not under legal liability to the relators. The Court of Appeals has said that "such board is a statutory tribunal or court to hear and to allow or reject any claims presented against the town. The examination of the account is the trial and its allowance or disallowance is the judgment of this tribunal." (*People ex rel. Myers v. Barnes*, 114 N. Y. 317, 323.) Applying this test to the facts disclosed by the record here, it must be plain that the act of the board in meeting was the convening of the quasi-judicial body for the purpose of the trial; that the production of the contract, claim and record corresponded to the introduction of the evidence, and that the consideration which the board appears to have given to the matter was the argument *pro* and *con* upon the questions involved; after all of these functions had been performed

the body proceeded to judgment, and based its rejection of the claim upon a plain, clear ground, which cannot be construed otherwise than to indicate that the town board properly conceived its jurisdictional duty in the premises. It carried out fully the requirements imposed upon it by law, and after a legal consideration of the matter reached a determination upon the merits, which was its final judgment.

As to whether or not town boards perform such acts as will be considered legal audits, in compliance with the statute requiring them to audit and allow or reject the claims, is properly determined, we think, by considering whether or not the action is placed upon a decision of the merits of the controversy. We have recently held this, in effect, in *People ex rel. Rhodes v. Mole* (85 App. Div. 33). That was an appeal from an order granting a writ of peremptory mandamus compelling the board of town audit to reaudit the bill of the relators, and it appeared that the appellants there rejected the claim on the ground that the relators failed to appear before the board and offer evidence in support of their claim. This was held to be no audit, for the decision was not upon the merits.

Mandamus may not be invoked to review a judicial or quasi-judicial decision. (*People ex rel. Sims v. Collier*, 175 N. Y. 196.) The Court of Appeals in the *Sims* case, speaking by WERNER, J., has quoted with approval the language of Judge VANN in *People ex rel. Harris v. Commissioners* (149 N. Y. 26) which is as follows: "The primary object of the writ of mandamus is to compel action. It neither creates nor confers power to act, but only commands the exercise of powers already existing, when it is the duty of the person or body proceeded against to act without its agency. While it may require the performance of a purely ministerial duty in a particular manner, its command is never given to compel the discharge of a duty involving the exercise of judgment or discretion in any specified way, for that would substitute the judgment or discretion of the court issuing the writ for that of the person or persons against whom the writ was issued. In such cases its sole function is to set in motion without directing the manner of performance. * * *

It is a universal rule that in the discharge of all duties involving the exercise of official judgment or discretion the officer or tribunal must be left free to act, and cannot be controlled in a particular direction.

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* * * When the law requires a public officer to do a specified act in a specified way, upon a conceded state of facts, without regard to his own judgment as to the propriety of the act and with no power to exercise discretion, the duty is ministerial in character, and performance may be compelled by mandamus if there is no other remedy. When, however, the law requires a judicial determination to be made, such as the decision of a question of fact or the exercise of judgment in deciding whether the act should be done or not, the duty is regarded as judicial and mandamus will not lie to compel performance." The court cited to the same effect *People ex rel. Francis v. Common Council* (78 N. Y. 33); *People ex rel. Myers v. Barnes* (114 id. 317); *People ex rel. Grannis v. Roberts* (163 id. 70.)

These authorities, and the cases cited by Judge VANN, are, we think, controlling upon the facts disclosed by this record. The appellants are charged by law with the duty of passing upon such claims as relators presented against the town; the claim was rejected upon a view of the legal question involved adverse to the relators. Instead of seeking a review of this question by certiorari the relators applied for a writ of mandamus to compel the appellants to audit the account, and this proceeding has resulted in an assessment by a jury of this court of the amount of the relators' claim and a peremptory writ of mandamus directing the appellants to audit and *allow* the claim at that amount. The order directing the final writ of mandamus has had the effect of the exercise by the Supreme Court and its jury of the functions which are by law exclusive in the town board. The jury's liquidation of the claim has been improperly substituted for that which properly belonged to the appellants to make. That the appellants may have misconceived the question of legal liability of the town is no sufficient reason to deprive the town board of the functions of auditing attaching to it by statute. The proper procedure was to have corrected its erroneous conception of the law, if there was error, and remanded the claim for audit after the legal question of liability had been determined.

Other serious questions are presented by the appeal, but inasmuch as the view of the case which we have expressed disposes of the appeal, we do not consider it necessary to pass upon them.

The order appealed from should be reversed, with costs, and the proceeding dismissed.

All concurred; BARTLETT, J., in result in separate opinion.

WILLARD BARTLETT, J.:

I have no doubt that the peremptory writ of mandamus under review in this proceeding is wrong, so far as it requires the board of town auditors to allow the relators the specific sum of money therein stated on account of their claim, and the additional specific sum for costs, disbursements and allowance. The province of determining the amount to be awarded belongs to the board of town auditors, in the first instance, subject to judicial review by writ of certiorari. The precise sum which they shall allow in any given case cannot be fixed in a mandamus proceeding. The extent of the jurisdiction of the court over a board of town auditors by mandamus goes no further than to command action in respect to the amount to be awarded on account of a legal claim.

To this extent I agree with Mr. Justice HOOKER. It does not seem to me, however, that the rejection of the claim here in controversy, on the express ground that it was not a legal claim, was in any sense an audit; it was rather a refusal to audit at all. The board of town auditors thereby threw the claim wholly out of consideration on the ground that it was something with which they had nothing to do; and, under the authorities, I think their action in this respect can be corrected by mandamus, if the claim is legal in its character, no matter how extravagant in amount. This seems to have been the view taken in *People v. Supervisors of Delaware Co.* (45 N. Y. 200), where FOLGER, J., says: "The court has the power to decide whether a rejected claim is a legal claim against the county; and if it be a legal claim, it may instruct and guide the board of supervisors by *mandamus*, in the execution of their duty; not to prescribe for them at what amount the claim shall be allowed (unless indeed the amount is fixed by law); but to compel them to admit that it is a legal claim, and to exercise their discretion as to the amount."

The last clause quoted is directly applicable to the circumstances of the present case. (See, also, *People ex rel. Smith v. Trustees*, 11 App. Div. 108.) It seems to me, therefore, that we should

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inquire, in the first instance, as to whether the claim of the relators is one enforceable against the town of White Plains for any amount whatever. If we determine that it is not, then we should reverse the order below absolutely. If we determine that it is a legal claim for some amount, then we should modify the order so as to leave untouched that portion which commands the board of town auditors to audit the claim, but strike out those portions which require them to audit it at a particular amount. In other words, we should command them to treat the charge as lawful, but leave them unfettered as to fixing the amount.

Order reversed, with ten dollars costs and disbursements, and proceeding dismissed.

SAMUEL L. VAN AKIN, Appellant, v. ERIE RAILROAD COMPANY,
Respondent.

Destruction of freight in a railroad freight house by fire—it does not establish negligence on the part of the railroad company—exemption in a bill of lading from liability for loss by fire.

Where freight, destroyed by fire while in the freight house of a railroad company, was shipped under a bill of lading exempting the railroad company from liability for the loss of the freight by fire, the owner of the freight cannot recover its value from the railroad company without showing that the fire was the result of the negligence of the railroad company or of some breach of its duty. The occurrence of the fire does not, of itself, justify an inference of negligence on the part of the railroad company.

APPEAL by the plaintiff, Samuel L. Van Akin, from a judgment of the County Court of Orange county in favor of the defendant, entered in the office of the clerk of the county of Orange on the 13th day of March, 1903, reversing a judgment of a justice of the peace of the town of Deerpark, in said county, in favor of the plaintiff entered on the 5th day of May, 1902.

Joseph Rosch, Jr., for the appellant.

Philip A. Rorty, for the respondent.

Judgment of the County Court of Orange county affirmed, with costs, on the opinion of the county judge.

All concurred.

The following is the opinion of the county judge :

BEATTIE, J. :

The respondent seeks to sustain the judgment appealed from upon the ground that the defendant was negligent in having a dog in the freight house, which it is claimed must have escaped from the crate or box in which it was shipped and, upsetting the lamp or lamps in the freight house, caused the fire which destroyed the goods belonging to the respondent. The undisputed facts are that the freight which was destroyed reached the station of Lackawaxen at eleven-twenty-five P. M. and was put in the freight house ; at one-nine A. M. the dog arrived and was also put in the freight house. The freight house was lighted by two kerosene lamps placed upon a table in the center of the freight room and had been used in that way for about eighteen years. Within half an hour after the dog arrived he gnawed his way out of the crate in which he was confined. He was put back in the crate with the broken slats against the floor and two packages weighing together about fifty pounds were placed on top to prevent the upsetting of the crate. So far as the proof shows the dog was not seen again and there is no evidence that he again escaped from the crate. At three-forty A. M. the fire was discovered. The witness testified that it was in the upper end of the depot, the entire building ablaze and that he could not distinguish anything. The witness who testified was employed and working about the depot handling freight, baggage and express shipments. There was no evidence that it was his duty to remain at the freight station all that time, and prior to the fire he had been away from the building about forty minutes.

Upon this proof it was wholly uncertain to what cause the fire was attributable. The dog came as freight and was, therefore, properly put in the freight house. Upon its escape it was again carefully confined and so far as the proof shows did not again escape.

Assuming that it did, there is no evidence that it upset the lamps or that the fire originated from the upsetting of the lamps. As was

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said in *Whitworth v. Erie Railway Co.* (87 N. Y. 419), "the bills of lading contain a general exemption from liability for loss by fire, and the loss having occurred from this cause, it was incumbent on the plaintiff, in order to avoid the effect of the exemption, to show that the fire was the result of the defendant's negligence, or that the loss resulted from some breach of the defendant's duty. The burden was upon the plaintiff to show facts taking the case out of the operation of the exemption clause. * * * Accidental fires, occurring without negligence, are frequent. The occurrence of a fire does not alone justify the inference of negligence."

It is apparent that, as was said in *Seifter v. Brooklyn Heights R. R. Co.* (169 N. Y. 254), "the plaintiff's superstructure of speculation and fact combined is, therefore, without any foundation to rest upon and it must fall."

The judgment must be reversed, with costs.

Cases
DETERMINED IN THE
THIRD DEPARTMENT
IN THE
APPELLATE DIVISION,
March, 1904.

WILLIAM B. KIRK and Others, Composing the Copartnership of
KIRK, DRISCOLL & COMPANY, Plaintiffs, v. THE HOME INSURANCE
COMPANY, Defendant.

*Marine insurance — restriction to “New Haven harbor and adjacent inland waters,”
construed — it does not authorize the use of the vessel in Bridgeport harbor.*

A policy of marine insurance upon a steam dredge containing the following provision, “Warranted confined to the use and navigation of the waters of New Haven Harbor and adjacent inland waters,” does not cover the sinking of the dredge in Cedar creek, an inland water, which is a part of or an adjunct to Bridgeport harbor, where it appears that Bridgeport harbor is some seventeen miles and Cedar creek some eighteen miles west of New Haven harbor.

In such a case it is as probable that the phrase “adjacent inland waters,” was the language of the insured as that it was the language of the insurer, and under such circumstances the rule that the policy must be construed strictly against the insurer does not apply.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

Lewis R. Parker, for the plaintiffs.

William Ives Washburn, for the defendant.

PARKER, P. J. :

The plaintiffs seek to recover upon a policy of insurance, issued by the defendant, which insured them to an amount not exceeding \$7,500 against the usual marine perils, to their steam dredge *Driscoll* for one year from April 7, 1902. On September 8, 1902,

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the dredge was sunk in Cedar creek, which is a part of, or an adjunct to, the harbor of Bridgeport, in the State of Connecticut. The policy contained the following provision: "Warranted confined to the use and navigation of the waters of New Haven Harbor and adjacent inland waters with privilege to lay up and make additions, alterations and repairs, and to go in Dry Dock. Losses or averages of each voyage or trip to be adjusted separately.

"Any deviation beyond the limits named in this Policy shall void this Policy, but upon the return of said vessel within the limits named herein, this Policy shall reattach and continue in full force and effect, but never beyond the date hereinbefore set for the termination of this Policy, and provided only, no disaster has occurred during said deviation."

The single question presented to us, is, whether Cedar creek, the place where the dredge sank, is within the limits specified by the phrase, "waters of New Haven Harbor and adjacent inland waters."

The submission concedes that if Cedar creek, which is confessedly an inland water, may, within the purpose and intent of such phrase, be deemed as adjacent to New Haven harbor, then the plaintiffs are entitled to recover, otherwise not.

Bridgeport harbor is some seventeen miles, and Cedar creek some eighteen miles, west of New Haven harbor.

Evidently the purpose of such provision was to limit the locality where the dredge was to be used. We may assume that some waters are more perilous than others, and, therefore, the applicants were required to state where the dredge was to be used, and the contract was made with reference to those waters. The waters of New Haven harbor are clearly specified. There is no ambiguity about that phrase; but what was intended by the further phrase "and adjacent inland waters?" The "Sound" is concededly not "inland waters," and so the dredge might not be used there, although it is adjacent to New Haven harbor. Evidently the purpose of such limitation was to confine the use of the dredge to "New Haven Harbor" and waters adjacent to that harbor, other than the sound. If, under the phrase "adjacent inland waters" we may include Bridgeport harbor, seventeen miles away, I see no reason why New London harbor or even New York harbor may not be included, as there seems to be no element in the case to show

why fifty miles may not be considered adjacent as well as seventeen miles. The effect of such a construction would be to extend the limitation to any harbor and adjoining inland waters on the Connecticut coast; and if such was the purpose, it would have been better expressed in that language. Clearly such a sweeping effect was not intended by the phrase used.

The specifying of the one harbor seems to me to repel the idea that any other harbor was intended. Bridgeport is a harbor as prominent and important as is New Haven harbor, and it has several inland waters leading into and adjoining it. If the purpose of the contract was to insure the dredge while being used in those waters, as well as while being used in New Haven harbor, both harbors would have been named. It is incredible that a harbor so distinct and prominent as Bridgeport would have intentionally been described as an "inland water adjacent to New Haven Harbor." As suggested above, any other harbor on the Connecticut coast, where the dredge might happen to sink, might as well be claimed to be included within the phrase used, and thus the limitation to New Haven harbor was practically meaningless.

It is urged that the only inland water adjoining or connected with New Haven harbor is the Quinnipiack river, a water in which it could not be expected the dredge would be used, and that, therefore, the word "adjacent" must necessarily apply to inland waters some distance from and not at all connected with that harbor; and, hence, as the language used must be construed strictly against the insurer, other harbors and other inland waters are not excluded from the terms of the policy.

But we must, in reason, assume that the plaintiffs made the statement as to where the dredge was to be used; and it is as probable that the phrase in question was their language as that it was the defendant's. Under such circumstances, the rule that the policy must be construed most strictly against the insurer does not apply (*London Assurance Corp. v. Thompson*, 170 N. Y. 94, 100-103), and a reasonable interpretation of the words used, in the light of the surrounding circumstances, should control us. If the language was the plaintiffs', it does not at all follow that the defendant knew what the nature of the Quinnipiack river was, or whether or not there were any inland waters connected with New Haven harbor. It

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was informed that the insured desired to use the dredge in that harbor, and was content with language that limited its use to that harbor, and such inland waters as, in the ordinary meaning of the word, were adjacent thereto. It had no reason to expect that other harbors were intended. It had every reason to assume that they were not.

I am of the opinion that the insurance did not cover the loss at the place where the dredge was sunk, and that the defendant is entitled to judgment, with costs.

All concurred.

Judgment directed for the defendant, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WILLIAM TAYLOR, Appellant.

Manslaughter — unnecessary force used in self-protection — if that force did not cause the death a conviction is improper — proof that the deceased had one knife does not disprove his possession of another — a charge, in effect, that a preponderance of evidence establishes guilt beyond a reasonable doubt.

Upon the trial of an indictment under which the defendant was convicted of the crime of manslaughter in the second degree, it appeared that the deceased died as the result of injuries received in an altercation with the defendant which the defendant claimed, and there was no proof to the contrary, had been started by the deceased attacking him with a knife. No single injury received by the deceased was sufficient of itself to cause death, which resulted from a shock caused by all the injuries taken together. The evidence did not establish how much force the defendant used.

Held, that even if the defendant had used more force than was necessary to defend himself from the assault, it not having been shown beyond a reasonable doubt that such extra force, which was the only force unlawfully used, resulted in the death of the deceased, the defendant could not be convicted of manslaughter;

That evidence that during the time that it was claimed that the deceased owned the knife, with which the defendant contended the deceased began the assault, a witness had seen him in possession of another knife, was immaterial, as it did not follow from the deceased's possession of the other knife that he did not have the knife in question;

That a charge that the People were bound to satisfy the jury "by a preponderance of evidence of the guilt of the defendant, and when they do satisfy you of

that, it should be your province and duty to bring the defendant in guilty," was erroneous, as the People were bound to prove the defendant's guilt beyond a reasonable doubt;

That the error was not cured by a further charge to the following effect: "The People do not ask you to find a verdict on insufficient evidence, and unless you believe that the case is proven beyond any reasonable doubt you must acquit. What we mean by reasonable doubt is not a speculative doubt as to what a person might have done, but such a reasonable doubt as an ordinarily reasonable man would have after looking the entire transaction over, and the defendant is entitled to the benefit of such a doubt at every turn of the case."

APPEAL by the defendant, William Taylor, from a judgment of the County Court of Tioga county, entered in the office of the clerk of the county of Tioga on the 22d day of December, 1903, upon the verdict of a jury convicting the defendant of manslaughter in the second degree, and also from an order entered in said clerk's office on the 21st day of December, 1903, denying the defendant's motion for a new trial.

The defendant was indicted for manslaughter in the first degree. The charge is that on August 26, 1903, he committed an assault and battery upon one Charles Warner, under circumstances that rendered such act a "crime and misdemeanor of assault in the third degree," and that as the result of such assault said Warner died on August 29, 1903. The defendant was brought to trial before a county judge and a jury, and found guilty of the crime of manslaughter in the second degree. On December 21, 1903, he was sentenced to State prison for the term of ten years.

From the judgment of conviction so rendered, and from an order of the County Court denying the defendant's motion for a new trial, this appeal is taken.

Martin S. Lynch, for the appellant.

Stephen S. Wallis and *Oscar B. Glezen*, for the respondent.

PARKER, P. J. :

Warner was an old man, some seventy years of age, and somewhat crippled with rheumatism, and was an inmate of the county poorhouse. He was in the habit, however, of stopping for days at a time at the house of the defendant, who was a farmer. On the twenty-sixth of August, last, both had been to the village to see a

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fireman's parade, and both had returned home to the defendant's house in the evening, and both were then drunk. Both continued to drink after their return, and finally they got into a fight in the kitchen of the defendant's house, and Warner was so badly bruised and shaken up that he subsequently died from the effects thereof.

The defendant, however, claims that the fight was started by Warner's attacking him with an open knife, and that the assault and the treatment which Warner then received were given while the defendant was protecting himself from such attack, and in his, the defendant's, effort to avoid the knife and wrest it away from Warner. In short, the issue presented by the defendant was, that his assault upon Warner was entirely in self-defense.

No one, save the deceased, saw anything of the fight, except the defendant and his wife; therefore, their statements are the only means we have of ascertaining its details. Who commenced it, how vigorously or persistently the deceased fought and what weapons he used, can be ascertained only from their statements.

The defendant testified that the deceased attacked him with a knife, the one which was produced in evidence, and that whatever injuries he inflicted upon the deceased were caused in repelling that attack. The wife testified that when she heard the noise and went into the room, she saw the deceased and the defendant clinched and that in such struggle they both fell through the door, into the adjoining milkroom, and onto the floor. Before they fell, she heard the defendant tell the deceased not to draw a knife on him, and the deceased said he would kill him; defendant said: "You have killed one man, but you can't kill me." While struggling on the floor in the milkroom, she saw the deceased have the knife in his hand, and the defendant had hold of his wrist with his left hand, and was apparently trying to wrest the knife from the deceased. After the fight was over, she testifies she found the knife on the floor in the milkroom. It is not practical or necessary to repeat here all of their details of such fight. It may be conceded that it is hardly sufficient to account for all the bruises and the actual conditions found upon deceased after his death, but the all-important question is: Who commenced the fight? Did the deceased begin it by an attack upon the defendant with the knife? If he did, the case is left in very grave doubts as to whether the defendant can be

said to have committed an unjustifiable assault upon the deceased which resulted in the latter's death.

I do not discover in the evidence any *fact* tending to show that the deceased did not make such an attack. The weight of evidence is that the knife was the deceased's, and no expression of the defendant at the time of the occurrence or statement made the next day is inconsistent with his sworn testimony that deceased first attacked him with the knife.

In the face of the testimony of the defendant and his wife to that effect, the burden of proof is with the People to show that such an attack was not made; and, although we may disbelieve their statement for the reason that they are so much interested to establish it, we can hardly say that it is proved beyond a reasonable doubt that it was the defendant and not the deceased that commenced the fight. The defendant's claim *may* be true; there is no proof that it was not, and, therefore, we must consider the case as if the defendant was called upon to defend himself against such an attack.

If, when the fight first began, the defendant was defending himself against the deceased's attack upon him with a knife, how can we say that he used more violence than was necessary in such defense? We know nothing of the force and persistency with which such attack was made, except as the defendant and his wife testified to them; and as they describe it, and in view of the fact that the defendant was concededly drunk and so likely to be prevented from intelligently using his full strength, what shall we assume he did, more than it was necessary to do in order to prevent a serious injury to himself?

But if we conclude from the bruised condition of the deceased that more force than was necessary *must* have been used, still the evidence hardly sustains the conclusion that death resulted from such *extra force*. The medical testimony shows that no single injury was sufficient to cause death; *that* resulted from the shock caused by all the injuries taken together. The evidence, therefore, fails to show *beyond a reasonable doubt* that even if more force than was in fact necessary to defend himself was used that such *extra force*, which was the only force *unlawfully* used, resulted in the death of the deceased. The defendant might be guilty of an

unjustifiable assault under such circumstances, but the fact that death resulted *therefrom* not being proved, manslaughter could not be predicated upon it. This point was fairly raised by the defendant in a request that the court so charge, which was refused. Also the court had already charged substantially the other way. And in this respect an error seems to have been made.

Another error is claimed by the defendant to have been made in the admission of evidence. The defendant's wife had testified that she saw the deceased have the knife in question on different occasions. The witness Smith testified that he gave such knife to the deceased in December, 1902. For the purpose of disproving the claim that the knife was the deceased's the People swore one George Barr, who testified that he had kept the county poorhouse since January 1, 1902; that the deceased was then there and stayed until the last of March and then went up to the defendant's; that while there he saw the deceased have a knife, but it was not the knife in question. This evidence was taken under the defendant's objection and exception. Manifestly it was entirely immaterial to any issue in the case. Smith testified that the deceased got the knife in December, 1902; that is nearly a year after the time Barr alludes to, and of course, in view of that fact, Barr could not be expected to see it in the deceased's possession. But assume that Barr referred to the winter of 1903 when he saw the other knife in the deceased's possession, and never saw this one, it does not at all follow that deceased did not have this one. It is an improper method of reasoning that because deceased had another knife during that winter it may be presumed that he did not have this one. Such evidence does not *tend* to disprove that the deceased did not have this knife the next August, nor that Smith did not give it to him the previous December.

Yet, by allowing it to go to the jury, they were practically instructed that they might legitimately reason in that way.

The question as to whether or not the deceased had that knife was one of considerable importance, and the admission of Barr's testimony was well calculated to work an injury to the defendant.

A further error is claimed by the defendant to have been committed in the charge of the court. The jury were instructed that

the People were bound to satisfy them "by a *preponderance of evidence* of the guilt of the defendant, and when they do satisfy you of that, it should be your province and duty to bring the defendant in guilty." This, of course, was clearly erroneous, but the People claim that it was cured by a further charge to the following effect: "The People do not ask you to find a verdict on insufficient evidence, and unless you believe that the case is proven beyond any reasonable doubt you must acquit. What we mean by reasonable doubt is not a speculative doubt as to what a person might have done, but such a reasonable doubt as an ordinarily reasonable man would have after looking the entire transaction over, and the defendant is entitled to the benefit of such a doubt at every turn of the case."

The substance of this charge seems to be that unless they believe the case proven beyond a reasonable doubt, they should acquit the defendant, but if there is a preponderance of evidence against him they must find him guilty. That is, that a preponderance of evidence *proves* beyond a reasonable doubt. The definition which the court gave of "a reasonable doubt" does not interfere with this conclusion. The jury may very well have so understood it. In fact, I do not see how they could have understood it in any other way; and, in view of the very doubtful character of the evidence by which it is sought to convict this defendant of manslaughter, it is more than probable that such charge operated greatly to the defendant's injury. He was convicted because the jury believed that the preponderance of the evidence was against him; and the rule that gives him the benefit of a reasonable doubt was thus eliminated from the case.

For these reasons the judgment and order should be reversed and a new trial granted.

All concurred; CHASE and CHESTER, JJ., in result.

Judgment reversed and new trial ordered.

DANIEL BIRDSINGER, Respondent, v. McCORMICK HARVESTING
MACHINE COMPANY, Appellant.

Warranting a "machine to do good work, to be well made, of good materials, and to be durable if used with proper care" — the vendor is not liable for personal injury caused to the vendee by the breaking of the gearing while in use—general and special warranty, distinguished.

A corn husker and shredder was fitted with a lever, by means of which the rollers could be stopped for the purpose of cleaning them when clogged. The machine was sold by the manufacturer under a contract containing the following clause: "It is distinctly understood that the above mentioned machine is purchased subject to the following warranty, and no other: * * * McCormick Harvesting Machine Co. warrants this machine to do good work, to be well made, of good materials, and to be durable if used with proper care."

The rollers having become clogged while it was in use by one of the vendees, he pressed the lever and, the rollers having stopped, started to clean them. Suddenly, and without warning, the rollers began to revolve, and his hand was caught therein and injured. It appeared that the accident was caused by the breaking of a part of the gearing by which the rollers were made to revolve.

Held, that the manufacturer of the machine was not liable under its warranty for the injuries sustained by the vendee, as the warranty was not a special, but a general one, and as the accident was not one which was a natural or probable result of a breach of that warranty;

That, even if the warranty was in legal effect a special warranty, the manufacturer would not be liable for the injuries, as it is not enough to authorize the recovery of all consequential damages that the warranty should be special, but in addition thereto the nature of the warranty must be such as to indicate that the damage suffered was contemplated by the contract of warranty.

Seemly, that the liability created by the warranty (whether construed as special or general) did not extend beyond the obligation to make good to the vendee the machine as warranted.

APPEAL by the defendant, the McCormick Harvesting Machine Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Rensselaer on the 20th day of May, 1903, upon the verdict of a jury for \$5,875, and also from an order entered in said clerk's office on the 20th day of May, 1903, as resettled by an order entered in said clerk's office on the 11th day of June, 1903, denying the defendant's motion for a new trial.

The defendant, in September 1901, sold to the plaintiff and his

brother a machine known as a corn husker and shredder. In the use of this machine the plaintiff had his hand caught between two rollers called the snapping rollers, the office of which was to take the corn from the stalks as the stalks passed through between the rollers. His hand was so mutilated that it was required to be amputated. The contract of sale of this machine contains the following provision: "It is distinctly understood that the above mentioned machine is purchased subject to the following warranty, and no other: * * * McCormick Harvesting Machine Co. warrants this machine to do good work, to be well made, of good materials, and to be durable if used with proper care." This action is brought upon this warranty, the plaintiff claiming to be entitled to recover for his injuries as consequential damages for a breach thereof. In operating the machine the plaintiff stood upon a platform directly in front of the machine about three feet back of these snapping rollers into which he pushed the corn stalks. These rollers at times became clogged, and in order to clean them it was necessary to stop the rollers. This was done by means of what is called in the book of instructions a safety lever, the arm of which is placed directly in front of the man operating the machine and underneath the board over which the corn stalks are pushed into the machine. By pushing forward slightly with his body upon this lever the gearing to which these snapping rollers are attached is thrown off so that they cease to revolve and may be safely cleaned. Upon the day in question, the rollers having become clogged, the plaintiff pressed upon the lever, the gearing was thrown off and the rollers ceased to revolve. He thereupon proceeded to clean out the rollers with his hand. Suddenly, without warning, the rollers began to revolve, his hand was caught and the injury occasioned. There is evidence that a part of this gearing by which the rollers were made to revolve had become broken; that this caused a bolt to slip out of its place which thereupon became wedged in the gearing in such a way as to render ineffective this safety lever; that these rollers were thereby set in motion notwithstanding the proper use of the safety lever. The jury has found that the defendant violated its warranty in failing to provide a durable machine, well made and of good materials, and that the plaintiff's injury was due to the failure of the defendant to provide a machine as warranted, and

upon these findings, under the direction of the court, a verdict for substantial damages was rendered in behalf of the plaintiff. An appeal has been taken from the judgment and from the order denying the motion for a new trial.

Dyer & Ten Eyck and E. Countryman, for the appellant.

Charles I. Webster and William J. Roche, for the respondent.

SMITH, J. :

In *Rich v. Smith* (34 Hun, 136) the plaintiff sued upon a breach of warranty of a mare. She was in fact vicious and ran away, injuring the plaintiff, the mare and the carriage. The trial court stated the measure of damage to be the difference between the value of the mare as she was and her value if she had been as warranted. Presiding Justice JAMES C. SMITH, in writing for affirmance of the judgment appealed from, in part says: "The rule laid down by the judge is that which applies in the case of a general warranty of personal property sold. Where, however, the warranty is special, having reference to a particular purpose for which the property is to be used out of the ordinary course, a different rule applies. In the latter class of cases, the vendee is entitled to recover in case of a breach of the special warranty, such damages as either arise naturally, that is, in the usual course of things, from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties when making the contract, as the probable result of the breach. (*Passinger v. Thorburn*, 34 N. Y. 634, and cases there cited by DAVIES, C. J.) But where the warranty is general an accidental damage even in the vendee's own affairs is not regarded. As was said by COWEN, J., in *Hargous v. Ablon*, 5 Hill, 472: 'The search is for immediate and necessary consequences.'"

In *Passinger v. Thorburn* (34 N. Y. 634) the rule is stated in the head note, "where there is a special warranty and a breach, the plaintiff is entitled to such damages as were the natural and necessary consequences of the breach." In *White v. Miller* (71 N. Y. 118) it was held that upon the sale of Bristol cabbage seed there was an implied warranty that the seed was Bristol cabbage seed, and also that such seed was free from any latent defect arising from the

mode of cultivation. In that case the measure of damage adopted was the difference in value between the crop raised from the defective seed, and a crop of Bristol cabbage such as ordinarily would have been produced that year. In *Hoe v. Sanborn* (36 N. Y. 98), where a saw was sold by warranty, the court held the measure of damage to be the difference in the value of the saw as delivered and a saw of the quality as warranted. PARKER, J., in writing for the court, said: "There being no warranty that the saw was fit for any specific use, there is no opportunity for the application of the rule, that the vendee is entitled to such damages beyond those contemplated by the rule above stated, as were the natural and necessary consequences of the breach, which has been applied to cases where the warranty has been so specific. (*Passinger v. Thorburn*, 35 Barb. 17; S. C., 34 N. Y. 634.) It is only to such cases that this rule has been applied. It was said in *Hargous v. Ablon*, 5 Hill, 473, 'A warranty or promise concerning a thing, being general, that is to say, not having reference to any purpose for which it is to be used out of the ordinary course, the law does not go beyond the general market in search for an indemnity against its breach.' (See also *Milburn v. Belloni*, 34 Barb. 607.) The offer to show the damages which the defendant had sustained, consequent upon the failure of the saw to operate, was therefore properly overruled."

It may be difficult to sustain the rule that only in case of special warranty can consequential damages be recovered. It has been held that if a gun or a boiler explodes, a vendee may recover consequential damages for a breach of the warranty that it was well made and sound. Primarily the contract of warranty is simply a contract to make good to the vendee the value of the article sold. In no case have further and consequential damages been allowed, unless there is indicated an intention to contract as against such further damage. While generally that intention is indicated by a special warranty, it may be, as in the warranty of a gun or a boiler as sound and well made, that the warrantor is presumed to have contemplated as damages personal injuries as being the natural and probable result of a breach of the warranty. In the case at bar we find no special warranty. The warranty is general. The accident was not one which was a natural or probable result

of a breach of that warranty. With a break in the machinery, the safety lever might not be expected to work, but it could not reasonably have been anticipated that the rollers would stop revolving for a sufficient time to induce the operator to put his hands upon them, and then, without apparent cause, commence to revolve and cause the injury which has been here suffered. This is not such a case then as with a general warranty there can be held to have been contemplated any such consequential damages.

The respondent contends, however, that while this warranty is a general warranty in form, inasmuch as the machine has a single use, to wit, the shredding and husking of corn, the legal interpretation of the warranty is that the machine is well made and suitable for that purpose. He then argues that there is in legal effect a special warranty which brings the case within the authority of those cases authorizing the recovery of consequential damages. It is not enough, however, to authorize the recovery of all consequential damages that the warranty should be special. The nature of the warranty must be such as to indicate the damage suffered as that contemplated by the contract of warranty. Within the respondent's contention as to the legal effect of this warranty, if a quantity of corn should be bruised in passing through the machine, such damage might well be held to be consequential damage within the contemplation of the parties, and as such recoverable. From a warranty that this machine was of good material and well made for the purpose of husking and shredding corn, no promise can legally be implied to compensate the vendee for personal injuries suffered in the operation of the machine. In *Bruce v. Fiss, Doerr & Carroll Horse Co.* (47 App. Div. 273) consequential damages were allowed for a breach of a warranty of a horse that it was "sound, kind and true, and gentle and quiet in harness, and suitable for use by plaintiff in his profession as a physician, to drive in harness as a carriage horse." Justice CULLEN, in writing for the court, says: "We think one of the most natural and probable results of a breach of this warranty and from the viciousness of the horse, would be injury to the vehicle and its occupants." The ultimate question in the consideration of all contracts is the determination of the real intention of the parties. In this contract of warranty, whether it be construed as special or general, we are unable to find any intent to

become liable for any damage suffered beyond making good to the vendee the machine as warranted.

Other objections to this judgment are urged by the appellant which it thus becomes unnecessary to consider. The judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

WARREN W. BUTTON, Respondent, v. MILDRED HEMMENS, Appellant, Impleaded with JOSIAH G. SALISBURY, as Administrator with the Will Annexed of SARAH J. DAVIS, Deceased and Others.

Trust to pay over the income and, in the discretion of the trustee, the principal of a trust fund to the cestui que trust — on the death of the trustee the discretionary power to pay over the principal vests in the court, to be exercised only on proof of the necessity therefor.

The will of a testator provided, "I give and bequeath to my executor hereinafter named in trust for my brother Warren W. Button, all the remainder of my property and estate to be invested, and such portion of the interest and principal as in the judgment of my said executor as* may be proper for his use shall be paid to him annually towards his support; but in no case shall any portion be applied in payment of any judgment, claim or cause of action now or hereafter existing against him, nor upon any claim or demand against him which is not appraised by said executor. My said executor may at any time when he deems it for the interest of my said brother pay over to him the whole or any part of the principal. My said executor may invest at such rate of interest as he may deem best for the security of the principal at less than the legal rate." The executor and trustee died and an administrator with the will annexed was appointed.

Held, that the trust did not terminate upon the death of the trustee, but that it vested in the Supreme Court to be exercised by its appointee or the administrator with the will annexed, the substituted trustee;

That it was the duty of the administrator with the will annexed to pay the income of the trust fund yearly to the *cestui que trust* and so much of the principal

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thereof as the court, in its discretion, should say was proper and necessary for his support;

That this discretion of the court was not an arbitrary discretion, and could only be exercised upon evidence showing the circumstances and necessities of the *cestui que trust*, and that, in the absence of any proof upon that subject, it was improper for the court to direct the administrator with the will annexed to pay over to the *cestui que trust* the principal of the trust fund.

APPEAL by the defendant, Mildred Hemmens, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Saratoga on the 25th day of March, 1903, upon the decision of the court, rendered after a trial at the Saratoga Special Term, directing Josiah G. Salisbury, the administrator with the will annexed of Sarah J. Davis, deceased, to pay over to the plaintiff the full amount of the estate intrusted to him.

Upon the 14th of January, 1897, Sarah J. Davis died at Saratoga Springs, N. Y., leaving a last will and testament with a codicil thereto, which read as follows :

"In the name of God, Amen: I, Sarah J. Davis, of Saratoga Springs, N. Y., being of sound mind and memory and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish and declare this to be my last will and testament, that is to say :

"*First.* After all my lawful debts are paid and discharged, I give and bequeath to my beloved sister, Amy C. Marshall, of Williamstown, N. Y., the sum of five hundred (\$500) dollars, and all my household furniture, wearing apparel and jewelry.

"*Second.* I give and bequeath to my executor hereinafter named in trust for my brother Warren W. Button, all the remainder of my property and estate to be invested and such portion of the interest and principal as in the judgment of my said executor as* may be proper for his use shall be paid to him annually towards his support ; but in no case shall any portion be applied in payment of any judgment, claim or cause of action now or hereafter existing against him, nor upon any claim or demand against him which is not appraised by said executor. My said executor may at any time when he deems it for the interest of my said brother

* *Sic.*

pay over to him the whole or any part of the principal. My said executor may invest at such rate of interest, as he may deem best for the security of the principal, at less than the legal rate.

"Likewise I make, constitute and appoint John W. Crane of Saratoga Springs to be executor of this my last will and testament hereby revoking all former wills by me made.

"In witness whereof, I have hereunto subscribed my name and affixed my seal the 22nd day of June, in the year of our Lord, one thousand eight hundred and ninety-five.

"SARAH J. DAVIS. [L. s.]"

"CODICIL.

"Whereas, I, Sarah J. Davis, of Saratoga Springs, N. Y., have made my last will and testament bearing date the 22d day of June, 1895, in and by which I gave and bequeathed to my sister Amy C. Marshall, the sum of five hundred dollars (\$500), and all my household furniture, wearing apparel and jewelry.

"Now, therefore, I do by this writing, which I hereby declare to be a codicil to my said last will and testament, and to be taken as a part thereof, order and declare that only the sum of fifty dollars (\$50) be paid to my said sister, Amy C. Marshall, and the said clause of my will above quoted is hereby revoked so that only the said sum of fifty dollars shall be paid to her in full and in place of said legacy bequeathed to her in said will, I devise and bequeath the remainder of said legacy to my brother, Warren W. Button, named in the second clause of my said will, subject to the same trusts as therein mentioned. In all other respects I hereby ratify and confirm my said will and direct that this codicil be annexed to and made a part of my said last will and testament.

"In witness whereof I have hereunto set my hand and seal this fourteenth day of March, 1896.

"MRS. SARAH J. DAVIS."

John W. Crane, the executor named in the will, qualified and took possession of the estate, which consisted entirely of personal property. In his lifetime he paid to the plaintiff in this action the sum of \$1,400. Upon the 26th of August, 1900, the said Crane died. Thereafter Josiah G. Salisbury was appointed by the surrogate of Saratoga county administrator with the will annexed of Sarah

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J. Davis, and also the trustee under the will in the place of said John W. Crane. He duly qualified as such administrator and trustee, and received the sum of about \$2,700 from the estate of John W. Crane as the estate of said Sarah J. Davis undisposed of during the lifetime of said Crane. The said Salisbury, doubting his power as administrator with the will annexed, to pay over to the plaintiff these moneys, refused to pay to him any part thereof, and this action was brought against the said Salisbury and others, including Mildred Hemmens, a niece and one of the next of kin of Sarah J. Davis, to compel the said administrator to pay over the full amount remaining unpaid of said estate to the plaintiff. The trial court directed the said administrator to pay over to the plaintiff the full amount of said estate, and from the judgment entered upon this decision Mildred Hemmens, one of the next of kin of Sarah J. Davis, here appeals.

Nash Rockwood, for the appellant.

W. A. Pierson and *Charles S. Lester*, for the respondent.

SMITH, J. :

The express trust created by the will of Sarah J. Davis did not terminate upon the death of the trustee. It then vested in the Supreme Court to be exercised through its appointee, or the administrator with the will annexed, the substituted trustee. (*Matter of Valentine*, 3 Dem. 563; *Matter of Hecht*, 71 Hun, 63.) After the death of Crane, therefore, this substituted trustee was required to pay the income of the said fund yearly to the plaintiff, and so much of the principal as the court, in its discretion, should say was proper and necessary for his support. This discretion of the court, however, is not an arbitrary discretion and can only be exercised upon evidence showing the circumstances and necessities of the *cestui que trust*. Upon the trial of this action there was no evidence whatever upon which could be based a finding that the plaintiff was in need of any more than the income of the trust fund, and the direction of the court, therefore, to pay over the principal thereof as well as the income was clearly unauthorized.

The judgment should, therefore, be reversed and a new trial

granted, with costs to the appellant in this court and the court below to be paid out of the estate of Sarah J. Davis.

All concurred; PARKER, P. J., in result; HOUGHTON, J., not sitting.

Judgment reversed and new trial granted, with costs to appellant in this court and in the court below to be paid out of the estate of Sarah J. Davis, deceased.

E. BEMENT & SONS, Respondent, v. GEORGE W. ROCKWELL,
Appellant.

Right of a vendee to revoke an order for goods before its acceptance.

An order for the shipment of goods may be revoked by the party giving it at any time before it has been accepted by the party to whom it is addressed.

REARGUMENT of an appeal by the defendant, George W. Rockwell, from a judgment of the County Court of Chemung county, entered in the office of the clerk of the county of Chemung on the 22d day of March, 1898, reversing a judgment of a Justice's Court in favor of the defendant, dismissing the plaintiff's complaint.

On the original argument the Appellate Division affirmed the judgment of the County Court without opinion (62 App. Div. 630).

Upon the 20th day of December, 1893, the defendant gave to the agent of the plaintiff an order addressed to the plaintiff and requested it to make and ship to him "on or about April 1st * * * 8 Lever Ajax cults. comp. \$4.25." This order was signed by the defendant. Upon January 1, 1894, the defendant wrote to the plaintiff a letter, of which the following is a copy:

"HORSEHEADS, N. Y., *Jany. 1st*, 1894.

"E. BEMENT & SONS,

"Lansing, Mich.:

"GENTLEMEN.—When your Mr. Forster was here I had a sample cultivator ordered and since that time I have set it up and find it equally good as the Ajax and the price 25c. less. If you care to make the price the same on my order of Dec. 20th, viz.: 8

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Lever Ajax Cultv. complete at \$4.00, 4 mos. June 1st, or 5 per cent July 1st, you can fill the order, otherwise you may cancel it. Awaiting your early answer, I am,

“Very truly,

“GEO. W. ROCKWELL.”

Other correspondence was had between the parties resulting in the absolute refusal of the defendant to take the goods and the refusal of the plaintiff to accept the cancellation of the order. Thereafter the plaintiff shipped the goods to the defendant, which were not accepted by the defendant, and this action was brought in Justice's Court for the purchase price thereof. In Justice's Court the plaintiff was nonsuited. This judgment of nonsuit was by the County Court reversed without opinion. From the judgment of reversal the defendant has appealed to this court.

Richard H. Thurston, for the appellant.

Dailey & Bentley, for the respondent.

SMITH, J. :

We cannot agree with the learned county judge that a cause of action was proven in Justice's Court. The order for goods was delivered to the plaintiff's agent upon December twentieth. Upon January first, before there had been any act upon the part of the plaintiff signifying acceptance of such order, this order was revoked. It is unquestioned law that an order unaccepted constitutes no contract, and until its acceptance by the party upon whom the order is drawn the right of revocation is clear. The party upon whom the order is drawn may refuse to accept the order or deliver the goods, and until his acceptance thereof there can be no liability upon his part. It follows, therefore, that there can be no liability upon the party giving the order until the acceptance. In *McCormick Harvesting Machine Co. v. Richardson* (39 Iowa, 525) it is held : “An order or request in writing, addressed to a dealer or his agent, to ship to the writer, on or about a date named, goods of a kind specified, for which the writer agrees to pay a price named, does not constitute a contract until accepted or acted upon by the vendor, and may be withdrawn at any time before acceptance.” In

Bronson v. Herbert (95 Mich. 478) it is held: "An order to ship trees, given to an agent, does not become a binding contract between the orderer and the principals until accepted by them in writing, and notice is given to the orderer of such acceptance." In *Goodspeed v. Wiard Plow Co.* (45 Mich. 322) it is held: "An order for goods does not amount to a contract binding the person who gives it until some act is done on the faith of it by the person to whom it is given, or until it is accepted." In that case, prior to February 13, 1879, one Goodspeed and Fales were partners in business. On the twenty-eighth day of January preceding the dissolution Fales, in the name of the firm, but in the absence of Goodspeed and without his knowledge or authority, gave to the agent of the Wiard Plow Company an order in writing for a large number of articles connected with their business, to be shipped on the first day of April thereafter. On the thirteenth of February the firm was dissolved, and on the same day the agent was informed of the dissolution. On the fifteenth of February a portion of the articles were shipped, and the remainder thereafter, all coming into the hands of Fales. There was no proof of any other acceptance of the order than the shipment. The trial court held that Goodspeed was bound by the contract. This was reversed by the Supreme Court upon the ground that the order not having been accepted until after dissolution was a contract made after the dissolution and not before. The opinion in part reads: "The order given by Fales made no contract until accepted, and until acceptance could at any time be withdrawn. Inasmuch as the amount of goods exceeded fifty dollars, there could be no binding contract as against the Wiard Plough Company without either a writing or some act done on the faith of the order. Here there was no proof of acceptance of the order in writing if at all." It will thus be seen that in this case an order given to an agent of the plaintiffs twenty-five days before dissolution and not accepted at that time was deemed not to have been binding upon them as a contract until the acceptance thereof. In *Weiden v. Woodruff* (38 Mich. 130) the head note reads: "Assumpsit was brought on the following instrument: '[Date and address] You will please send me galvanized lightning rods for my house within sixty days, for which I will give you thirty-five cents per foot, due when work is completed. [Signature.]' Held, that this was only an order

which the maker, until notified of its acceptance, could withdraw, and which bound neither party until accepted; and that the rule excluding parol evidence to modify written contracts did not apply to it so as to exclude evidence of oral agreements entered into when the order was given."

But this rule of law is not seriously questioned in the brief of the respondent. Its contention is that this objection cannot be for the first time raised upon appeal. The motion for the nonsuit, however, in the Justice's Court, was made upon the ground that the evidence did not establish a cause of action; and further, that the evidence did not establish the cause of action set forth in the complaint, and further, that the evidence shows that the contract was legally and properly rescinded by the defendant. We think this is sufficient to fully raise this question in the court below, and that the defendant may now rely upon the same in support of his contention.

We are of opinion, therefore, that the judgment was improperly reversed by the county judge, and that the judgment of the County Court should be reversed, and that of the justice affirmed, with costs to the appellant in this court and in the County Court.

All concurred; PARKER, P. J., and HOUGHTON, J., in result.

Judgment of the County Court reversed and of the Justice's Court affirmed, with costs to the appellant in this court and in the County Court.

THE ALBANY COUNTY BANK, Respondent, v. THE PEOPLE'S CO-OPERATIVE ICE COMPANY, Appellant, Impleaded with EDWARD McCABE. (No. 1.)

Crediting by a bank to a customer's account the proceeds of a note discounted — it is not a payment for the note — the bank does not become a holder for value — effect of notice to the bank that there was an entire failure of consideration for the note before it pays over the money — how far notice of dishonor is notice of such infirmity in the paper.

The crediting by a bank of the proceeds of a note, which it has discounted, to the account of the customer for whom the discount was made, is not, of itself, a payment for the note; it is simply a promise by the bank to pay such proceeds to the customer by honoring his checks or drafts in the ordinary way pursued

by banking institutions. The bank does not, by such transaction, transfer to the customer the title to any particular money, but simply becomes a debtor to the customer to the amount of such claim.

The bank does not become a holder of the note for value until it has paid over the proceeds of the note to the payee.

A bank which discounts, in due course of business, a promissory note for the payee thereof before maturity, and places the proceeds of the discount to the credit of the payee and retains the same until after it obtains knowledge that there is an entire failure of consideration for the note as between the maker and the payee thereof, cannot, after bringing an action against the maker and the payee to recover upon the note, pay the proceeds of the discount to the payee and retain the right to insist that it is a holder for value and is protected from any defense existing between the maker and the payee.

In such a case the bank is not a holder of the note in due course as defined by section 91 of the Negotiable Instruments Law (Laws of 1897, chap. 612).

Section 93 of the Negotiable Instruments Law, which provides, "Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him," is simply declaratory of the existing law.

Quære, whether notice of dishonor of a note is alone sufficient in all cases to constitute notice, to a bank discounting the note, of an infirmity therein or of a defect in the title of the person who discounted it.

CHESTER, J., dissented.

APPEAL by the defendant, The People's Co-operative Ice Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Albany on the 11th day of May, 1903, upon the verdict of a jury for \$1,050.97, and also from an order entered in said clerk's office on the 19th day of May, 1903, denying the said defendant's motion for a new trial made upon the minutes.

This action is brought on a promissory note of which the following is a copy :

"NEW YORK, *May* 20, 1902.

"\$1000. * * * Five months after date we promise to pay to the order of Edward McCabe, One thousand dollars at Union Square Bank, N. Y., with interest. Value received.

"THE PEOPLE'S CO-OPERATIVE ICE COMPANY.

"S. MEHRBACH, *Prest.*

"S. C. BLAKE, *Treas.*"

There is no dispute about the execution of the note and its delivery to the payee. Edward McCabe, the payee, had been a regular customer of the plaintiff for eight or ten years. He kept an account at the bank and always had a balance to his credit. On the sixteenth day of October, four days before the note became due, McCabe, at plaintiff's bank, presented the note to the cashier and asked him to discount it, and the note was accepted without further conversation and McCabe's account was credited with the amount of the note less sixty-eight cents discount.

When the note became due it was duly presented for payment at the Union Square Bank, New York, and payment demanded, which was refused, whereupon the note was duly protested for non-payment. On the seventeenth day of November McCabe again called at the bank and produced another note exactly the same in every respect as the one previously discounted except that it was payable six months after its date instead of five months after its date, and asked the cashier to discount it, and such note was accepted without further conversation, and McCabe's account was credited with the amount less fifty-two cents discount.

On October sixteenth, at the time the first note was discounted, McCabe had to his credit with the plaintiff \$1,580.14. The amount placed to his credit on discounting said note was \$1,024.32, making the amount to his credit with the plaintiff on that day \$2,604.46. That amount remained without further deposits and without any checks being paid therefrom until the day the second note was discounted. When the second note was discounted the amount placed to the credit of McCabe as the proceeds of such note was \$1,029.48. On that day, whether before or after the credit of the second note does not appear, one check of \$15 was paid by plaintiff. McCabe then had a balance of \$3,618.94 to his credit. On October 29, 1902, the plaintiff sued the defendant appellant and said McCabe on said first note.

The complaint alleges the making and delivery of the note, its presentation for payment, and that payment was refused. McCabe did not answer or appear in the action, but the defendant appellant appeared in the action November 13 and served its answer December 11, 1902, and the answer of defendant appellant admits the

making and delivery of said note and denies the other allegations of the complaint, and as a separate and distinct defense alleges in detail the making of an agreement in writing between the defendant appellant and said Edward McCabe and the giving by said defendant appellant to said McCabe of seven notes of like date and form, payable one each month, commencing August 20, 1902, and ending February 20, 1903, and it further alleges with some detail the facts by which it claims that the consideration for the giving of said notes wholly failed. The note in suit is one of the seven notes so given. The deposit to the credit of McCabe in the plaintiff's bank of \$3,618.94 remained therein without change on November 21, 1902. On December 30, 1902, McCabe had a balance to his credit with the plaintiff of \$4,403.93. At the time of the trial McCabe did not have any money on deposit with the plaintiff, but when the same was drawn from the bank does not appear, and it does not appear whether McCabe drew any money from his account with the plaintiff between November 21, 1902, and December 30, 1902. At the time the note was discounted, McCabe was not in any way indebted to the bank.

The action was tried at the Albany Trial Term in April, 1903. On the trial after the facts as above stated were shown, and it was conceded by defendant that it had no further testimony that it desired to produce relating to plaintiff's knowledge of the maker's defense to the note at the time plaintiff discounted the note, the court refused to allow the defendant to produce testimony relating to its defense and directed the jury to find a verdict in favor of the plaintiff for the amount of the note with interest, and a verdict was found accordingly. A motion was made to set aside the verdict and for a new trial, which was denied.

Herbert R. Limburger and *P. J. Rooney*, for the appellant.

Lansing Hotelling, for the respondent.

CHASE, J. :

The question is presented by this appeal whether a bank which purchases in due course of business a promissory note of the payee therein named before maturity, and places the purchase price thereof to the credit of such payee and retains the same until after knowl-

edge that there is an entire failure of consideration for the note as between the maker and payee thereof, can subsequently give to the payee the proceeds of the note and retain the right to insist that it is a holder for value and protected from any defense existing between said maker and payee.

The question is here free from any complication that may arise where such payee's account is an active one and the balance is materially changing from day to day. The evidence is undisputed that the proceeds of the note were deposited to the payee's account, and such proceeds of the note (except perhaps fifteen dollars thereof), and also a much larger amount remained on deposit with the plaintiff not only until the note was dishonored, but until long after the plaintiff brought this action, and so far as appears until long after defendant's answer was served.

The Negotiable Instruments Law (Laws of 1897, chap. 612) provides :

"§ 96. * * * A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

"§ 91. * * * A holder in due course is a holder who has taken the instrument under the following conditions :

"1. That it is complete and regular upon its face ;

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact ;

"3. That he took it in good faith and for value ;

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

"§ 51. * * * Value is any consideration sufficient to support a simple contract. * * *"

"§ 93. * * * Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."

A deposit by a bank of the proceeds of a note to the account of a customer is not of itself a payment for the note. It is simply a promise by the bank to pay such proceeds to the customer by honoring his checks or drafts in the ordinary way pursued by banking institutions. The bank does not by such transaction transfer the title to any particular money to its customer. The bank becomes a debtor to the customer to the amount of such credit.

It is said by the Supreme Court of the United States in *New York County National Bank v. Massey* (192 U. S. 138, 145), "It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character. (*Bank of the Republic v. Millard*, 10 Wall. 152.) Or, as defined by Mr. Justice WHITE in the case of *Davis v. Elmira Savings Bank* (161 U. S. 275, 288): 'The deposit of money by a customer with his banker is one of loan with the superadded obligation that the money is to be paid when demanded by a check.' (*Scammon v. Kimball*, 92 U. S. 362.)"

The Court of Appeals in *Aetna National Bank v. Fourth National Bank* (46 N. Y. 82) says: "The relation of banker and customer in respect to deposits is that of debtor and creditor. When deposits are received they belong to the bank as a part of its general funds, and the banker becomes the debtor to the depositor and agrees to discharge the indebtedness by paying the checks of the depositor, his creditor. The contract between the parties is purely legal and has no element of a trust in it."

The rights of parties where a note has been discounted by a bank and the proceeds credited on the books of the bank to the person from whom it was purchased has been repeatedly stated by text writers and by the court, from some of whom we quote as follows: Daniel on Negotiable Instruments (5th ed. § 779b) says: "The apparent purchase must have been a purchase in fact and not a

mere bookkeeping entry.— Mere discount and credit do not of themselves constitute a *bona fide purchaser* for value. To occupy that position the holder must actually have parted with something of value for the note. Thus, where a bank discounted a note for a company, and credited it with the amount, the credit, on account of other deposits, subsequently increasing, so that at the time of suit on the note the bank had actually paid nothing for it, it was held not a purchaser for value, and that its remedy was to tender the note back to the company and cancel the credit.”

In Eaton & Gilbert on Commercial Paper (p. 306) it is said: “A bank by merely discounting a bill or note and placing the proceeds to the credit of the payee does not become a holder for value, but where the bank on the strength of such credit, has relinquished securities in its possession or made advances to or paid the checks of the payee it becomes a holder for value.”

In Cyclopedia of Law and Procedure (Vol. 7, p. 929) it is said: “While the authorities are not entirely uniform upon the subject, it is fairly well settled that a bank, by discounting negotiable paper, placing the same to the credit of the depositor, and honoring his checks or drafts, surrendering to him securities, or in some other manner making advances and extending its credit on the faith of such deposit, thereby become a holder for value. But the mere discounting and crediting of the amount on the depositor's account without making payment or incurring any increased obligations or liabilities is not sufficient.”

In American and English Encyclopædia of Law (Vol. 4 [2d ed.], p. 298) it is said: “Where a bank discounts paper for a depositor who is not in its debt and gives him credit upon its books for the proceeds of such paper, it is not a *bona fide* holder for value, so as to be protected against infirmities in the paper, unless in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues and the deposit is not drawn out, the bank is held subject to the equities of prior parties, even though the paper has been taken before maturity and without notice.”

In *Thompson v. Sioux Falls National Bank* (150 U. S. 231) it

is said: "The mere credit of a cheque upon the books of a bank, which may be cancelled at any time, does not make the bank a *bona fide* purchaser for value. If after such credit and before payment for value upon the faith thereof the holder receives notice of the invalidity of the cheque he cannot become a *bona fide* holder by subsequent payment."

In *Central National Bank v. Valentine* (18 Hun, 417) the court say: "The plaintiff by its president discounted the notes and gave the makers credit on the books of the bank for the amount, no money was actually paid or thing of value parted with by the plaintiff upon the strength of the indorsement or the discount. Under such circumstances the plaintiff cannot be regarded the *bona fide* holder of said notes for value, as we understand the law as settled by the adjudications upon that subject. The mere giving of credit by entering the amount on the books and not actually parting with a dollar upon the strength of the indorsement, cannot be regarded parting with value in the sense which the law contemplates. The parties in whose favor the credit was given might never draw or appropriate any portion of the fund."

In *Dykman v. Northbridge* (80 Hun, 258) the court cited *Central National Bank v. Valentine* (*supra*), and referring to the facts in the case before it, said: "The bank could not become a holder for value of the note by crediting its amount to the cashier. Unless he received the money as an individual, and not as cashier, the bank parted with nothing as a consideration for the note."

In *Sixth National Bank v. Lorillard Brick Works Company* (46 N. Y. St. Repr. 235) the court, referring to a note that had been discounted and the proceeds credited to the payee on the books of the bank, say: "The plaintiff must have actually paid out and parted with the proceeds of the discount before it could acquire an indisputable title thereto."

In *Clarke National Bank v. Bank of Albion* (52 Barb. 592) the court, referring to a check purchased by plaintiff of Ward & Bro., say: "The credit of the avails of the check to Ward & Bro. on the books of the bank was in no sense a paying over. The sum agreed upon as the price of the check was not by that act parted with and placed beyond the control of the plaintiff. * * * The plaintiff, upon receiving notice of dishonor, had an undoubted right to erase

the credit as it did, and restored it only at the special instance of Ward & Bro. No argument can prove that the bank had, prior to notice of dishonor, parted with value for this check."

From the authorities quoted it will be seen that a bank is not a holder of a note in due course as defined by the Negotiable Instruments Law when the proceeds of the note are simply credited to the person from whom it was purchased, and not paid out until the bank had notice of an infirmity in the instrument or defect in the title of the person from whom the note was purchased. Section 93 of the Negotiable Instruments Law seems to be declaratory of the law as uniformly stated in the decisions of this and other States. If it is conceded that the plaintiff had notice of an infirmity in the instrument in suit, or of defect in the title of McCabe thereto, before it paid out the full amount agreed to be paid therefor, the defendant appellant was entitled to give evidence of its defense by the express terms of the statute.

The effect of notice of dishonor of a note is stated in Daniel on Negotiable Instruments (5th ed. § 782) as follows: "If it were not paid at maturity, it is then considered as dishonored; and, although still transferable in like manner and form as before, yet the fact of its dishonor, which is apparent from its face, is equivalent to notice to the holder that he takes it subject to its infirmities, and can acquire no better title than his transferrer. The doctrine applicable to this subject has been admirably stated by Chief Justice SHAW, who says: 'Where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, Why is it in circulation? Why is it not paid? Here is something wrong. Therefore, although it does not give the indorsee notice of any specific matter of defense, such as set-off, payment or fraudulent acquisition, yet it puts him on inquiry; he takes only such title as the indorser himself has, and subject to any defense which might be made if the suit were brought by the indorser.'"

Whether notice of dishonor of a note is alone sufficient in all cases to constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, is not necessary now to determine. The facts before the court, when it refused to allow the defendant appellant to produce evidence relating to its defense, were such that the evidence should have been received. The judg-

ment should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred, except CHESTER, J., dissenting.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

INTERNATIONAL PAPER COMPANY, Respondent, v. HUDSON RIVER WATER POWER COMPANY, MORTON TRUST COMPANY and the TRUST COMPANY OF AMERICA, Appellants, Impleaded with KANES FALLS ELECTRIC COMPANY and HUDSON RIVER ELECTRIC COMPANY, Defendants.

Equity — action for specific performance of a contract and in default thereof for its revocation and the restoration of the parties to their previous condition — it rests in the discretion of the court — who are proper parties to such an action — when the complaint states a cause of action — allegation as to inadequate remedy at law — presumption on demurrer — offer to pay money payable on specific performance.

The complaint in an action brought by the International Paper Company against the Hudson River Water Power Company, the Morton Trust Company, the Trust Company of America, the Kanes Falls Electric Company, and the Hudson River Electric Company, alleged that the plaintiff, desiring to develop a water power for use in connection with its pulp and paper mills, purchased certain properties and river rights along the Hudson river; that during the same time the defendant the Kanes Falls Electric Company and one Ashley, the president of that company, had acquired and were attempting to acquire other property along the river in hostility to the plaintiff; that the plaintiff and the defendant Kanes Falls Electric Company entered into a contract by which they agreed to co-operate in purchasing and acquiring all the property rights necessary to the development of the water power between certain points, and to divide said properties and the cost of obtaining them between the parties in certain specified proportions; that there should be conveyed to the Kanes Falls Electric Company that part of the properties known as the "upper power," and that there should be conveyed to the plaintiff that part of the premises known as the "lower power;" that in November, 1889, the parties to the contract had acquired all the properties connected with the "upper power" and the greater portion of the properties connected with the "lower power," and that the money required for purchasing said properties had been chiefly, if not entirely, advanced by the plaintiff; that the Hudson River Electric Company and the Hudson River Water Power Company were thereafter organized by Ashley, and that Ashley desired to obtain title to the "upper power" in order to convey it to the Hudson River Water Power Company; that a further con-

tract was made between the Kanes Falls Electric Company and the plaintiff which recited that the Kanes Falls Electric Company was about to deliver to the plaintiff a deed of the "lower power," and that the plaintiff was about to deliver to the Trust Company of America a deed to the Kanes Falls Electric Company of the "upper power," said last-mentioned deed to be held by the trust company subject to the payment of \$125,000 by the Kanes Falls Electric Company; that \$90,000 of said \$125,000 should be, upon its receipt, paid by the trust company to the plaintiff, and that the remainder of \$35,000 should be held by the trust company until the accounts between the parties were settled; that pursuant to the contract, and in reliance upon the agreement on the part of Ashley and the Kanes Falls Electric Company to assist the plaintiff in procuring the remainder of the properties necessary to complete the "lower power," the plaintiff executed a deed conveying all of the "upper power" to the Kanes Falls Electric Company, and that the latter company thereupon conveyed the same to the defendant Hudson River Water Power Company, which received the conveyance with full knowledge of the agreement to assist the plaintiff in acquiring the properties necessary to complete the "lower power;" that at the time of the conveyance by the plaintiff to it, the Kanes Falls Electric Company executed a conveyance to the plaintiff of the properties then owned by it connected with the "lower power;" that the plaintiff was unable to procure the properties necessary to complete its title to the "lower power" by reason of the fact that the Kanes Falls Electric Company and Ashley wrongfully and in disregard and violation of their contracts, acquired such properties and conveyed them to the Hudson River Electric Company, which last-mentioned company refused to convey the same to the plaintiff; that the Hudson River Electric Company had executed a mortgage to the defendant Morton Trust Company, by which it conveyed to said trust company, together with other properties, the properties connected with the "lower power" as security for the payment of certain bonds; that none of the bonds had been actually issued for value; that the Hudson River Electric Company took title to the properties connected with the "lower power" with full knowledge of the contracts between the plaintiff and the Kanes Falls Electric Company; that it refused to convey such properties to the plaintiff, although the plaintiff had offered to repay to it the consideration paid for said properties, and that the properties in question were necessary to a full development of the "lower power."

The relief demanded was as follows :

- First.* That the court ascertain the cost to the defendant Hudson River Electric Company of the properties described in the complaint.
- Second.* That the Hudson River Electric Company be decreed to convey the properties described in the complaint to the plaintiff upon payment by the plaintiff of its proportion of the sums actually paid therefor.
- Third.* That the Kanes Falls Electric Company be required to pay the remainder of the amount so paid for said properties.
- Fourth.* That the amount so paid by the plaintiff and by the Kanes Falls Electric Company be paid to the Morton Trust Company and that said trust company

on receipt of said amounts be required to execute and deliver to the plaintiff a release of said properties from the lien of their said mortgage.

Fifth. That in lieu thereof the defendants the Hudson River Water Power Company and the Trust Company of America, as trustee, be decreed to reconvey to this plaintiff all the property connected with the upper power, conveyed to the Kanes Falls Electric Company by the plaintiff, upon the payment into court by the plaintiff of said sum of \$90,000, with interest thereon, and the conveyance by it to the defendant the Kanes Falls Electric Company of such properties as had been acquired by it prior to the making of said deed.

Sixth. For such other relief as may be just and proper in the premises.

The defendants the Hudson River Water Power Company, the Morton Trust Company and the Trust Company of America interposed separate demurrers to the complaint on the following grounds:

First. That it does not state facts sufficient to constitute a cause of action against the defendant demurring.

Second. That causes of action are improperly joined in this action.

Held, that the demurrers should have been overruled;

That the complaint set forth with sufficient definiteness facts enabling a court of equity to grant equitable relief;

That it appearing from the facts alleged that an action at law would give but an inadequate and imperfect remedy to the party aggrieved, it was not necessary that the complaint should allege that the plaintiff had no adequate remedy at law;

That the Morton Trust Company, which was the trustee mentioned in the mortgage given by the Hudson River Electric Company, was a proper party to the action, although none of the bonds secured by the mortgage had been issued for value, as the mortgage was an outstanding incumbrance and some of the bonds might have been issued, although not for value;

That the defendant the Trust Company of America, to whom the deed to the Kanes Falls Electric Company had been delivered in escrow, and which still held \$5,000 subject to the direction of the plaintiff and the Kanes Falls Electric Company, was a proper party to the action, although no specific relief was asked against it;

That the Hudson River Water Power Company would not be a necessary or proper party defendant if the action were brought solely to secure specific performance of the contracts, but that, as it was also brought to obtain a rescission of the contract and a reconveyance of the property transferred pursuant to the contracts, if, for any reason, specific performance could not be decreed, the Hudson River Water Power Company was a proper party;

That there was no reason why such alternative relief should not be demanded in the same action, and why the persons affected by either relief should not be made parties thereto, it appearing that the same transactions were to be considered, and that the principal part of the proof for the purpose of obtaining either relief was the same. (PARKER, P. J., dissented.)

In an action for specific performance all persons having or claiming an interest in the land derived from the vendor after the contract and with notice thereof are necessary defendants in a suit brought by the vendee or his representative.

In equity all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, so that there may be a complete decree which shall bind them all.

It is not essential in a suit in equity that all the parties should be interested in the same way or affected alike by the judgment demanded. It is proper to unite all the parties interested to avoid a multiplicity of suits and have an adjudication that will determine the question as to all parties interested in the subject-matter.

In considering a pleading demurred to it should be held to allege all facts that can be implied from the allegations by reasonable and fair intendment.

Where in an action in equity the amounts to be paid by either party to the other are uncertain and subject to an accounting between the parties, it is enough to offer in the complaint to pay or to perform whatever obligations rest upon the party bringing the action.

The right to specific performance of a contract or its rescission rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances and in the exercise of sound discretion.

APPEAL by the defendants, the Hudson River Water Power Company and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Saratoga on the 20th day of January, 1903, upon the decision of the court, rendered after a trial at the Montgomery Special Term, overruling the said defendants' separate demurrers to the plaintiff's complaint.

The plaintiff's complaint is very long. The following is a summary of the allegations thereof, so far as material, on this appeal:

The plaintiff in or about February, 1898, became the owner of certain pulp and paper mills, situated at Glens Falls and Fort Edward, N. Y., and elsewhere, and for the purpose of enabling it to develop a water power for use in connection with its mills at Glens Falls and Fort Edward, it also purchased various properties and river rights scattered along the Hudson river between a point south of Sherman's island and the south boundary of property formerly owned by the Hudson River Pulp and Paper Company at Palmer's Falls, N. Y., which property of the said Hudson River Pulp and Paper Company was also conveyed to the plaintiff. The various properties and river rights of the plaintiff's predecessor in title had been purchased largely through the agency and assistance of one Ashley.

Thereafter the plaintiff purchased from other persons properties

and river rights along said river, and attempted to obtain title to all property and river rights which it deemed necessary for the full development of the water power between the points named. During the times aforesaid the plaintiff discovered that the defendant the Kanes Falls Electric Company and said Ashley had acquired, and were attempting to acquire, other properties along said river in hostility to the plaintiff. Negotiations thereupon ensued which resulted in a contract dated the 1st day of May, 1899, between the plaintiff and the defendant Kanes Falls Electric Company, which contract recites that the parties thereto are respectively the owners of or that they control by agreement to purchase or otherwise, in their own names or in the names of other persons representing them, various properties adjoining the Hudson river between the points mentioned, and that the parties had agreed to co-operate in purchasing and acquiring all the properties between the said points necessary for the full ownership, development and protection of all power which can be developed between said points and to complete the titles to said properties and divide said properties together with the costs thereof between the parties thereto in certain specified proportions. Said contract then provides for co-operation between the parties thereto in securing the titles to all of the properties not then owned by them or one of them by persons representing one of them at the lowest cost possible, so as to obtain and complete the titles to all of said properties and for sharing in the costs thereof as in and by the contract provided. And said contract also provides for the conveyance to the Kanes Falls Electric Company of that part of the property along said river front in said contract specified and known as the "upper power" and for the conveyance to the plaintiff of that part of the property along said river front in said contract specified and known as the "lower power." And said contract also provides that the titles to said properties shall be completed as soon as possible and that conveyances thereof shall be made not later than August 1, 1899, and that if the title to any of said properties shall not be fully perfected by August first, it shall be completed thereafter as soon as possible at the joint expense of the parties thereto to be divided between them in the proportions in said contract provided. And said contract also provides that several of the properties, which will form portions of each power when fully

assembled, stand either in title or by option of purchase in different persons for the benefit of said paper company and that it is the intention of the agreement that persons holding the same shall at once convey the same, and that the options then existing in favor of the paper company or of the electric company or of any one for their benefit shall be completed, with a view of fully completing the entire title to all the properties in order that the same may be divided as in the contract specified. Said contract was made nominally with the Kanes Falls Electric Company, but the negotiations were had with said Ashley, the president of said company. The Hudson River Electric Company and the Hudson River Water Power Company were thereafter organized by said Ashley and the stock is substantially owned and controlled by him. The parties to the contract had not acquired all of the properties upon said river and were not ready to exchange deeds therefor on August 1, 1899, and the time so to do was extended. In November, 1899, the parties to the contract had acquired all the properties connected with the upper power and the greater portion of the properties connected with the lower power. At that time the defendant the Hudson River Water Power Company had been organized with Ashley as the president thereof, and it and said Ashley desired to obtain title to the properties connected with the upper power, by said contract to be conveyed to the Kanes Falls Electric Company, that they might be conveyed to said Hudson River Water Power Company. The money required for purchasing said properties had been chiefly if not entirely advanced by the plaintiff.

Upon request a further contract was made between said Kanes Falls Electric Company and the plaintiff, which recited that the Kanes Falls Electric Company is about to deliver to the paper company its deed of the lower power, and that the paper company is about to deliver to the Trust Company of America a deed to the Kanes Falls Electric Company of the upper power, to be by the trust company held, subject to the payment of \$125,000 by the Kanes Falls Electric Company, and it was in said contract further provided that certain properties connected with the lower power were still to be acquired, and that there appeared to be outstanding of record certain mortgages on certain properties upon said river, and that there might be outstanding titles in both of said powers

not at the time of making said contract known. It was agreed that the deed from the paper company to the Kanes Falls Electric Company should be delivered to the trust company and held by it subject to the payment of \$125,000, of which \$90,000 should be upon its receipt paid by the trust company to the paper company, and that the remainder of \$35,000 should be held by the trust company until the accounts between the parties for the properties theretofore acquired and the property thereafter to be acquired in order to complete the said powers should be adjusted in accordance with the contract of May 1, 1899, and that after said adjustment of accounts the parties should unite in a certificate to the trust company as to a division of said \$35,000.

It was further agreed that the title should be obtained and completed as speedily as possible of the properties connected with the lower power that had not been acquired. In pursuance of said contract and in reliance upon the agreement on the part of said Ashley and the Kanes Falls Electric Company to assist and co-operate with the plaintiff in acquiring the remainder of the properties necessary to complete the lower power, and in the belief that the defendants would carry out such agreement in good faith the plaintiff executed and delivered on the 9th day of November, 1899, a deed conveying all of the upper power to the Kanes Falls Electric Company and the Kanes Falls Electric Company thereupon conveyed the same to the defendant Hudson River Water Power Company. The Hudson River Water Power Company took and received such conveyance with full knowledge of the agreement and of the obligation resting upon said defendants to co-operate with the plaintiff in acquiring the title to the remaining properties necessary to complete the lower power. The Kanes Falls Electric Company at the time of the execution of the deed to it executed a conveyance to the plaintiff of the properties then owned by it connected with said lower power. Subsequently the parties to said contracts adjusted the accounts between them, and at the time of such adjustment it was agreed that there remained due the Kanes Falls Electric Company from the plaintiff a balance of \$634.35. On January 18, 1900, the parties to said contracts united in a direction to the defendant the Trust Company of America to pay over to the Kanes Falls Electric Company \$30,000,

and authorized it to retain in its hands the sum of \$5,000 to be held as security for the repayment of the said Kanes Falls Electric Company's proportion of the cost of the acquisition of the property still remaining to be acquired in order to complete the lower power. The plaintiff thereafter in consultation with the Kanes Falls Electric Company and said Ashley and in co-operation with them proceeded to acquire additional properties necessary to complete the lower power and complete its title to all of said properties, except to certain properties in the complaint described which it has been unable to acquire by reason of the fact that the Kanes Falls Electric Company and said Ashley wrongfully, and in disregard and in violation of said contracts, have through their agent acquired and conveyed to the Hudson River Electric Company, which last-mentioned company refuses to convey the same to the plaintiff.

On April 23, 1901, the Hudson River Electric Company was incorporated. On April 25, 1901, the said properties were by the defendants, in disregard and violation of said contracts, conveyed to said Hudson River Electric Company. On December 18, 1901, the Hudson River Electric Company executed a mortgage to the defendant Morton Trust Company, by which it conveyed to said trust company the said properties so connected with the lower power among others as security for the payment of certain bonds thereafter to be issued to an amount not exceeding \$3,000,000. None of said bonds have yet been actually issued for value. When the properties in the complaint described were acquired by the Kanes Falls Electric Company the Hudson River Water Power Company and said Ashley or either of them, or for account of either of them, the defendants were bound by the said contracts to convey the same to the plaintiff and the title acquired by them became and was subject to and impressed with a trust in favor of the plaintiff. The Hudson River Electric Company took title to said properties with full notice and knowledge of said contracts and with full knowledge of said trust and obligation on the part of the defendants named. The Hudson River Electric Company has refused and still refuses to make such conveyance to the plaintiff, although the plaintiff has duly demanded the same and offered to repay to the said defendant the consideration paid by it for the said properties. Said properties are not connected with other properties of the defendants and they

are in nowise essential to their operation. The Kanes Falls Electric Company well knew that the whole purpose and intention on the part of the plaintiff in making the contracts mentioned in the complaint and in executing and delivering the conveyance to the Kanes Falls Electric Company was to enable the plaintiff to acquire title to the property necessary to a full development of the water power known as the lower power, and that by reason of the wrongful failure on the part of the Kanes Falls Electric Company and the Hudson River Water Power Company and said Ashley to convey or cause to be conveyed to the plaintiff the pieces of property described in the complaint, in disregard and violation of the agreement, the principal consideration for the conveyance by the plaintiff to the Kanes Falls Electric Company of the properties connected with the upper power has wholly failed, and plaintiff is entitled to have the deed vacated and set aside on payment of \$90,000 received as stated and on reconveying to it the properties received at the time of the exchange of deeds, and the plaintiff offers to repay the said amount and reconvey said property upon receiving a reconveyance of the properties connected with the upper power from said Kanes Falls Electric Company.

All the defendants have, or claim to have, some right, title or interest in or to the said property, but that the said right, title or interest, if any, is subject and subordinate to the rights of the plaintiff. The complaint demands judgment :

First. That the court ascertain the cost to the defendant Hudson River Electric Company of the properties described in the complaint.

Second. That the Hudson River Electric Company be decreed to convey the properties described in the complaint to the plaintiff upon payment by the plaintiff of its proportion of the sums actually paid therefor.

Third. That the Kanes Falls Electric Company be required to pay the remainder of the amount so paid for said properties.

Fourth. That the amount so paid by the plaintiff and by the Kanes Falls Electric Company be paid to the Morton Trust Company and that said trust company on receipt of said amounts be required to execute and deliver to the plaintiff a release of said properties from the lien of their said mortgage.

Fifth. That in lieu thereof the defendants the Hudson River Water Power Company and the Trust Company of America, as trustee, be decreed to reconvey to this plaintiff all the property connected with the upper power, so called, conveyed to the Kanes Falls Electric Company by this plaintiff by the said deed dated November 9, 1899, upon the payment into court by this plaintiff of said sum of \$90,000, with interest thereon, and the conveyance by it to the defendant the Kanes Falls Electric Company of such properties as had been acquired by it prior to the making of said deed.

Sixth. For such other relief as may be just and proper in the premises.

Each of the appellants separately demurred to the complaint on two grounds :

First. That it does not state facts sufficient to constitute a cause of action against the defendant demurring.

Second. That causes of action are improperly joined in this action.

The issues of law joined by the service of the demurrers were tried and an order was entered overruling the demurrers, upon which orders interlocutory judgments have been entered.

Hand & Hale, for the appellant Hudson River Water Power Company.

Winthrop & Stimson, for the appellant Morton Trust Company.

George E. Mott, for the appellant The Trust Company of America.

Richard Lockhart Hand, for the appellants.

Bell & Wait and *Lewis E. Carr*, for the respondent.

CHASE, J. :

In an action for specific performance all persons having or claiming an interest in the land derived from the vendor after the contract and with notice thereof are necessary defendants in a suit brought by the vendee or his representatives. (Pom. Spec. Perf. Cont. [2d ed.] § 493.)

This is an action in equity. The equitable doctrines with respect to parties and judgments are wholly unlike those which prevailed at the common law, different in their fundamental conceptions, in their

practical operation, in their adaptability to circumstances and in their results upon the rights and duties of litigants. "The governing motive of equity in the administration of its remedial system is to grant full relief and to adjust in the one suit the rights and duties of all the parties, which really grow out of or are connected with the subject-matter of that suit. Its fundamental principle concerning parties is, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject-matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit. * * * The primary object is, that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned and the incidental or consequential claims or interests of all may be fixed, and all may be bound in respect thereto by the single decree." (Pom. Eq. Juris. [2d ed.] § 114.)

It has always been held as a general rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, so that there may be a complete decree which shall bind them all. (*Townsend v. Bogert*, 126 N. Y. 370.)

It is not essential in a suit in equity that all the parties should be interested in the same way or affected alike by the judgment demanded. It is proper to unite all the parties interested to avoid a multiplicity of suits and have an adjudication that will determine the question as to all parties interested in the subject-matter. This has been and is the practice in equity actions. (*Hall v. Gilman*, No. 1, 77 App. Div. 458.)

A party demurring to a pleading admits the facts alleged in such pleading, and in considering the pleading it should be held to allege all facts that can be implied from the allegations by reasonable and fair intendment. (*Sage v. Culver*, 147 N. Y. 241.)

By the demurrers herein the demurring defendants have admitted, among other things, that the plaintiff in purchasing the properties and river rights which it purchased prior to February, 1898, between the points named on the Hudson river, did so for the purpose of

developing a water power for use in connection with its mills and other property; that the defendant Kanes Falls Electric Company acquired various properties between the said points on the Hudson river in hostility to the plaintiff and that such antagonistic holdings of property and water rights so affected their respective schemes for the development of water power that it caused the plaintiff and said Kanes Falls Electric Company to enter into a contract to co-operate in dividing the said properties and in obtaining such other properties as were deemed necessary in the interest of each, and that each might obtain and hold severally the properties and water rights necessary to a complete water power, each independent of the other; that the properties to complete the upper power which by the terms of the contract were to be conveyed to the Kanes Falls Electric Company were first obtained and on request they were conveyed to it without waiting to obtain all the properties to complete the lower power which were to be conveyed to the plaintiff, and a further agreement was entered into on the part of the Kanes Falls Electric Company upon which the plaintiff relied, that said Kanes Falls Electric Company would continue to co-operate in obtaining the title to the properties not then conveyed to the plaintiff in accordance with the terms of said contracts; that the defendants, the Hudson River Water Power Company and the Hudson River Electric Company, knew of said agreements and the terms thereof, and the reason why the same were executed and in part performed; that the president of the Kanes Falls Electric Company is the president of the Hudson River Water Power Company and said companies, acting through said president, either directly or indirectly, obtained titles to the properties specifically described in the complaint, and transferred or caused the same to be transferred to the Hudson River Electric Company, which company received the same with full knowledge of the said agreements and all the circumstances connected with the execution thereof and of the consideration therefor, and that such company refuses to convey the same to the plaintiff; that the properties so conveyed to the Hudson River Electric Company are essential to the development of power for the benefit of the plaintiff and for carrying out the purpose for which the contracts were executed; that the failure to obtain such title prevents the carrying out of the purpose of the execution of

the contracts and destroys the principal consideration therefor. From the situation of the pieces of property specifically described in the complaint, the consideration and reason for executing said contracts and in partially performing the same and the essential character of said pieces of property in carrying out the purposes of the plaintiff, it is apparent that money damages would not be as complete and beneficial to the plaintiff as relief in equity, and that there would be serious if not insurmountable obstacles in attempting to estimate in money the plaintiff's damage if it fails to obtain title to pieces of property which are essential to it in completing the water power designated as the lower power. The properties mentioned in the complaint are essential links in a chain, the value of which as a chain depends entirely upon those particular links being included and used therewith. The Kanes Falls Electric Company obtained every benefit secured to it under said contracts while the plaintiff seems to have been deprived of the only real consideration for their execution.

A general statement in a complaint in an action of this character that there is no adequate remedy at law is not essential where it is manifest from the facts alleged that an action at law would give but an inadequate and imperfect remedy to the party aggrieved. The properties which the plaintiff desires should be decreed to be conveyed to it are specifically and definitely described in the complaint, and other allegations in the complaint admitted by the demurrers show that such properties are necessary for the full ownership, development and protection of the lower power as stated in the contracts made by and between the Kanes Falls Electric Company and the plaintiff. The complaint, including said contracts, shows an agreement sufficiently definite to enable the court to grant equitable relief. The time for performing the contracts is not of the essence thereof. We are of the opinion that the complaint contains sufficient on the face thereof to set a court of equity in motion.

The defendant the Morton Trust Company holds as trustee a mortgage given by the Hudson River Electric Company upon properties described in the complaint among other properties to secure the payment of bonds to an amount not exceeding \$3,000,000, and while it is alleged that none of said bonds have been issued for value, the fact remains that the mortgage is outstanding of record

and that bonds may have been issued, although not for value. Such mortgage is an incumbrance affecting the marketableness of the title to said properties and such mortgagee is a proper party that the court may determine and protect its rights as well as the rights of the other parties to the action.

The defendant the Trust Company of America is the corporation to which the deed to the Kanes Falls Electric Company was delivered and which held such deed in escrow pursuant to the terms of the contract under which it was delivered and subsequently delivered the same to the Hudson River Electric Company. It received the \$125,000 from the Kanes Falls Electric Company, pursuant to the agreement and has paid out \$120,000 thereof, and stills holds \$5,000 subject to the direction of the plaintiff and said Kanes Falls Electric Company. No specific relief is asked as against said defendant, but its presence as a defendant will bind it as well as the other parties to the action in any relief that may be granted, and in any direction that the court may make, in regard to the \$5,000 still remaining in its possession.

If the only purpose of this action was to obtain specific performance of the contracts, the Hudson River Water Power Company would not be a necessary or proper party defendant. While the action is for specific performance, it is also brought for a rescission of the contracts and a reconveyance of the property which has been transferred pursuant to the contracts, if for any reason specific performance thereof cannot be decreed. In an action for the rescission of the contracts the Hudson River Water Power Company is vitally interested. An action either for specific performance or for the rescission of contracts is distinctly an equitable one. The very foundation of the jurisdiction of equity in either case is the inadequacy of the remedy at law. The evidence in this case will not be changed in any particular by reason of the prayer for alternative relief, except so far as it relates to circumstances affecting the power of the court to decree specific performance.

It is said in the *Encyclopædia of Pleading and Practice* (Vol. 20, p. 499): "Generally, when the specific performance of a written contract to convey land is denied, a rescission of the contract will be decreed;" and the same authority (*Id.* pp. 461, 462) states that

a bill may pray for specific performance or in the alternative for a rescission. We can see no reason why such alternative relief should not be demanded in the same action, and why the persons affected by either relief should not be made parties thereto where the same transactions are to be considered, and the principal part of the proof for the purpose of obtaining either relief is the same.

So far as appears by the record before us the properties conveyed to the Kanawha Falls Electric Company and by the Kanawha Falls Electric Company to the Hudson River Water Power Company, as well as all other properties referred to in the complaint, remain in the same situation, and the legal and equitable rights of the parties are the same now as they were at the time the contracts were made, except so far as they have been changed by the conveyance mentioned.

Where in an action in equity relief is sought to be obtained and the amounts to be paid by either party to the other are uncertain and subject to an accounting between the parties, it is enough to offer in the complaint to pay or to perform whatever obligations rest upon the party bringing the action. (*Zebley v. F. L. & T. Co.*, 139 N. Y. 461.)

The right to specific performance of a contract or its rescission rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances and in the exercise of sound discretion. (*Winne v. Winne*, 166 N. Y. 263.)

We cannot say as a matter of law that the complaint in this case should be dismissed for insufficiency as against either of the defendants. The court, after a trial of the issues that may be framed and a consideration of any contemporaneous equities or equities arising by reason of subsequent events, can grant such relief as may be dictated by a sound discretion or dismiss the complaint as to all or any of the parties defendants.

The interlocutory judgments should be affirmed, with one bill of costs to the respondents.

All concurred, except PARKER, P. J., dissenting; SMITH, J., concurring in result.

Interlocutory judgments affirmed, with one bill of costs to the respondents.

In the Matter of the Application of EDWARD D. CANDEE, as Receiver of the ANGLO-AMERICAN SAVINGS AND LOAN ASSOCIATION OF NEW YORK, Appellant, for a Writ of Peremptory Mandamus against JOHN CUNNEEN, Attorney-General, Respondent.

Receiver — approval by the Attorney-General of a contract for the employment and compensation of attorneys and counsel by receivers — not compelled by mandamus — purpose of section 4 of chapter 60 of the Laws of 1902.

Section 4 of chapter 60 of the Laws of 1902 provides as follows: "The receiver may employ not to exceed one counsel and may make such payment upon account for legal services during the progress of the receivership as shall be just and proper, but no such payment on account shall be made to any counsel except upon the approval thereof in writing by the attorney-general, and such payments shall be subject to the order of the court in whole or in part upon the final settlement of the receiver's accounts to the same extent as the accounts of general assignees are subject to revision and allowance; but no compensation shall be allowed to an attorney for a receiver unless an agreement for his compensation has been made in writing upon the approval of the attorney-general. Additional counsel shall be employed only upon the written approval of the attorney-general."

Held, that two things were sought by the section: (1) To limit the payments on account for legal services during the progress of the receivership to such as are approved in writing by the Attorney-General; (2) to prohibit the allowance of compensation to an attorney "unless an agreement for his compensation has been made in writing upon the approval of the attorney-general;"

That the section was not susceptible of the construction that the approval required from the Attorney-General relates to the necessity of employing an attorney and counsel, and that if the necessity of employing an attorney and counsel be conceded, it is the duty of the Attorney-General to approve a contract of employment in which compensation is provided for, generally, without in any way fixing or limiting the amount thereof;

That the Attorney-General should not be required by mandamus to approve a contract made by a receiver with an attorney and counsel selected by him.

Quare, as to the constitutionality of the statute.

APPEAL by the petitioner, Edward D. Candee, as receiver of the Anglo-American Savings and Loan Association of New York, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Albany on the 14th day of November, 1903, denying the petitioner's application for a writ of peremptory mandamus.

Edward D. Candee was appointed permanent receiver of the

Anglo-American Savings and Loan Association on the 5th day of January, 1900. From the time of his said appointment he has, as such receiver, continuously employed Myer Nussbaum as his attorney and counsel. From February 26, 1902, said Myer Nussbaum was employed, pursuant to a contract in writing entered into between the receiver and Nussbaum, which contract was approved by the Attorney-General of this State. Said contract, by its terms, expired February 26, 1903. On February 26, 1903, a contract was entered into between said receiver and Myer Nussbaum, which provided

"That the said Edward D. Candee, as such receiver, shall and hereby does employ said Myer Nussbaum as his counsel, upon a compensation to be measured by the value of his services, payments thereon, if any, to be subject to the order of the Court in whole or in part, upon the final settlement of such receiver's accounts, payments thereon, however, to be made from time to time on account of such services as the same are performed and the payment thereof approved in writing by the Attorney-General."

On May 8, 1903, the Attorney-General wrote Myer Nussbaum as follows: "Referring to the matter of the agreement between yourself, as attorney, and Edward D. Candee, as receiver, as provided by section 4 of Chapter 60 of the laws of 1902, I enclose herewith contracts for you to execute as of date February 26, 1903, the expiration of your old agreement.

"Please insert such sum as the receiver and yourself shall agree to be a fair, just and reasonable compensation for the period named. If you will then return the contracts to me, I will pass upon them, as provided by the statute, and if approved, I will return one copy to you for your files.

"Kindly furnish me with a brief recital as to what remains for counsel to do in this receivership, aside from preparing for the final accounting.

"I would be pleased to have you give me such facts as were considered by yourself and the receiver in fixing your compensation."

The proposed contracts inclosed in said letter, among other things, provided: "It is further mutually agreed that the value of the said services of the attorney is to be adjusted by the Court upon the final settlement of the accounts of the receiver, but that the amount shall not exceed —— dollars. Partial payments may be made to

apply on account of said services from time to time, providing the consent of the Attorney-General be first obtained, but that the aggregate of all said partial payments shall not exceed a sum equal to fifty (50%) per cent of the said maximum sum.

"It is also understood that all payments which may be made shall be subject to the order of the Court, in whole or in part, until the final settlement of the receiver's accounts to the same extent as the accounts of general assignees are subject to revision and reduction, pursuant to section 4 of chapter 60 of the Laws of 1902 aforesaid."

No agreement was consummated between the Attorney-General, said receiver and Myer Nussbaum, his attorney and counsel, and thereafter the said written agreement of February 26, 1903, was presented to the Attorney-General for his approval, which approval was refused. An application was then made to the court for an order that a writ of peremptory mandamus issue out of the Supreme Court directing and commanding the Attorney-General to approve said contract. The court denied said application and from the order entered thereon this appeal is taken.

Myer Nussbaum, for the appellant.

John Cunneen, Attorney-General, and *William H. Wood*, for the respondent.

CHASE, J. :

Section 4 of chapter 60 of the Laws of 1902 provides as follows : "The receiver may employ not to exceed one counsel and may make such payment upon account for legal services during the progress of the receivership as shall be just and proper, but no such payment on account shall be made to any counsel except upon the approval thereof in writing by the Attorney-General, and such payments shall be subject to the order of the court in whole or in part upon the final settlement of the receiver's accounts to the same extent as the accounts of general assignees are subject to revision and allowance; but no compensation shall be allowed to an attorney for a receiver unless an agreement for his compensation has been made in writing, upon the approval of the Attorney-General. Additional counsel shall be employed only upon the written approval of the Attorney-General."

It is urged by the appellant that the approval required from the Attorney-General relates to the necessity of employing an attorney and counsel, and that if the necessity of employing an attorney and counsel is conceded, it is the duty of the Attorney-General to approve a contract of employment in which compensation is provided for generally without in any way fixing or limiting the amount thereof. We do not so read the statute. The statute expressly provides: "The receiver may employ not to exceed one counsel." There is no limitation upon such express power. The only express limitation on the employment of counsel is contained in the last sentence, namely, "Additional counsel shall be employed only upon the written approval of the Attorney-General."

The statute was not enacted for the purpose of affecting the selection by the receiver of one attorney and counsel. If the necessity of employing an attorney and counsel is conceded and an attorney and counsel is employed, except for the provisions of this statute such attorney and counsel would be entitled to reasonable compensation as a matter of law. An agreement for reasonable compensation is inferred in all ordinary contracts of employment. An approval, therefore, of the employment of an attorney and counsel in which agreement it is provided generally that he shall have compensation for his services would be an idle ceremony. The section of the statute quoted relates to the amount of compensation to be paid to the attorney and counsel of the receiver. Two things are apparently sought by its provisions: (1) To limit the payments or account for legal services during the progress of the receivership to such as are approved in writing by the Attorney-General; (2) To prohibit the allowance of compensation to an attorney "unless an agreement for his compensation has been made in writing, upon the approval of the Attorney-General."

The duties of a receiver of a corporation frequently extend over a considerable period of time, and it has been the practice to obtain orders from time to time, authorizing payments on account of legal services during the progress of the receivership. The allowance of such payments has been a frequent subject of discussion.

Whether this statute provides a way to aid the court in limiting the amount of payments on account of legal services prior to the final accounting of the receiver, or in correctly determining the

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aggregate amount of such compensation, is not now under consideration, but that the purpose of the act is to further restrict and control such payments and compensation cannot be doubted.

It is suggested that the statute is unconstitutional as interfering with the power of the Supreme Court. It may well be that the provision of the statute which wholly prohibits all compensation to an attorney properly and necessarily employed by the receiver, unless an agreement has been made in writing for his compensation upon the approval of the Attorney-General is an interference with the recognized power of the court. The question of the constitutionality of the statute is not necessary to the determination of this appeal and we do not pass upon it in any way. If compensation cannot be made to an attorney and counsel of a receiver unless there is an agreement in writing approving of such compensation then the Attorney-General is vested with a discretion in regard to such approval which cannot be interfered with by peremptory mandamus at least upon the facts shown in this record. If the statute is a violation of the Constitution the appellant is in no position to ask the court to compel the Attorney-General to act under such void statute.

The order should be affirmed, with ten dollars costs and disbursements.

All concurred ; SMITH, J., in result.

Order affirmed, with ten dollars costs and disbursements.

TOBIAS L. ROSE, Respondent, v. HARRISON WELLS, Appellant.

Costs on appeal from a judgment of a justice of the peace — when interest is considered in determining whether a recovery is more or less than an offer.

An action was brought in a Justice's Court to recover \$116 for merchandise sold and delivered by the plaintiff to the defendant. The latter interposed a counterclaim of \$125 for damages resulting from an alleged misrepresentation as to the quality of the merchandise. The trial in the Justice's Court resulted in a judgment for the plaintiff for \$116 and costs. The defendant appealed to the County Court and demanded a new trial therein. He also served an offer to

allow the plaintiff to take judgment against him for \$65, which offer the plaintiff did not accept. The case was tried three times in the County Court, the third trial resulting in a verdict for the plaintiff for \$75.

Held, that as it did not appear that the verdict of seventy-five dollars included interest, interest should not be computed on the amount of the plaintiff's offer of judgment, from the time when it was made to the rendition of the verdict, for the purpose of determining whether the verdict was more favorable to the plaintiff than the offer of judgment;

That, interest not being added to the amount of the offer, the plaintiff's recovery was more favorable to him than the offer of judgment and that, consequently, the defendant was not entitled to costs under section 8070 of the Code of Civil Procedure;

That the plaintiff was not entitled to costs under section 8070 of the Code of Civil Procedure, but that, as he had recovered fifty dollars or more in the County Court, he was entitled to costs under section 3228 of the Code of Civil Procedure.

In actions where the damages are liquidated, interest from the date of the offer to the date of the recovery should be taken into consideration in determining whether the recovery is more favorable than the offer.

In actions where the damages are unliquidated, the recovery should be compared with the offer without adding interest to the offer or discounting the amount of the recovery.

APPEAL by the defendant, Harrison Wells, from an order of the County Court of Cortland county, entered in the office of the clerk of the county of Cortland on the 30th day of September, 1903, denying the defendant's motion to set aside the taxation of plaintiff's costs and refusing to direct a new taxation of defendant's costs.

This action was commenced in Justice's Court. The plaintiff in his complaint alleged that the defendant was indebted to him for a quantity of cabbage sold and delivered to the defendant at the agreed price of \$116. The defendant by his answer denied the allegations of the complaint, and the answer further alleged: "The defendant says that he promised and agreed to buy a carload of cabbage of the plaintiff at \$7.50 per ton, provided they were first quality in every respect, and said to the plaintiff that he had not seen the cabbage in question and would not buy to lose any money on said cabbage and would not pay anything on said cabbage until he had a report from the sale of said cabbage, and if the car sold for less than \$7.50 a ton the plaintiff was to stand the loss, to which the plaintiff agreed.

"That in truth and in fact said cabbage in question was small,

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soft and poor and not merchantable or marketable, as the plaintiff had represented, so that defendant lost not only a legitimate profit but only received the sum of \$47.04 from the sale of said cabbage.

"That by reason of the said misrepresentation the defendant has suffered loss and damage in the sum of \$125.00 which he seeks to recover of the plaintiff."

The plaintiff obtained a judgment in the Justice's Court for \$116 besides costs. The defendant appealed and demanded a new trial in the County Court, and within fifteen days after the service of the notice of appeal and on February 16, 1894, served upon the plaintiff an offer to allow judgment to be taken against him for the sum of \$65. Plaintiff did not accept the defendant's offer, or serve an offer of judgment upon the defendant. The action was tried in the County Court and resulted in a verdict of \$82.43 in favor of the plaintiff. A motion was made before the judge presiding at the trial on his minutes to set aside the verdict and for a new trial, which motion was granted. On the second trial in the County Court a verdict was rendered in favor of the plaintiff for \$117.82. An appeal was taken from the judgment entered thereon to this court, and the judgment was reversed and a new trial granted, with costs to abide the event. (*Rose v. Wells*, 36 App. Div. 593.) The court in its opinion say: "We think it proper to say if the plaintiff's version of the case is true, that there was a sale of the cabbages at seven dollars and fifty cents per ton with warranty of their condition — that is that they were in fair merchantable condition, not poor or damaged stock, and if there was a breach of the warranty, the defendant was entitled to set off against the contract price his damages caused by such breach of the warranty."

On the third trial in the County Court a verdict was rendered in favor of the plaintiff March 21, 1900, for seventy-five dollars. After the last trial the plaintiff and defendant each presented to the clerk of the court the items of his costs and disbursements for taxation. The clerk refused to tax the defendant's costs, but taxed the costs of the plaintiff. A motion was made by the defendant to set aside the taxation of plaintiff's costs and to direct the taxation of defendant's costs, which motion was denied, and from the order entered thereon this appeal is taken.

Kellogg & Van Hoesen [*D. W. Van Hoesen* of counsel], for the appellant.

Irving H. Palmer, for the respondent.

CHASE, J. :

Section 3070 of the Code of Civil Procedure, being one of the sections of the article relating to appeals for new trials in the appellate court, is as follows: "Upon an appeal, provided for in this article, from a judgment for a sum of money only, either party may, within fifteen days after service of the notice of appeal, serve upon the adverse party, or upon his attorney, a written offer to allow judgment to be rendered in the appellate court, in favor of either party, for a specified sum. If the offer is not accepted it cannot be proved upon the trial. If the party within ten days after service of the offer upon him serves upon the party making the same, or upon his attorney, written notice that he accepts the offer, he must file it, with an affidavit of service of the notice of acceptance with the clerk of the appellate court, who thereupon must enter judgment accordingly. Where an offer is made as above provided, the party refusing to accept the same shall be liable for costs of the appeal, unless the recovery shall be more favorable to him than the sum offered. If neither party makes an offer, as provided herein, the party in whose favor the verdict, report or decision in the appellate court is given shall be entitled to recover his costs upon the appeal. Costs when awarded according to the provisions of this section shall be in amounts provided in section three thousand and seventy-three of this article."

The first and important question for determination is whether the verdict of seventy-five dollars rendered March 21, 1900, is a recovery more favorable to the plaintiff than the offer to allow judgment for sixty-five dollars made February 16, 1894. The recovery would seem to be more favorable to the plaintiff than the offer, in that seventy-five dollars is more than sixty-five dollars. It is claimed by the appellant that in comparing the offer with the verdict for the purpose of determining whether the recovery is more favorable to the plaintiff than the sum offered, interest should be computed on the offer from the time when it was made to the rendition of the verdict or the verdict should be discounted by such an amount

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as would leave a sum which, with interest thereon from the time when the offer was made, would amount to seventy-five dollars on March 21, 1900.

In actions where the damages are liquidated, interest from the date of the offer to the date of the recovery included in the verdict, report or decision, should be taken into consideration in determining whether the recovery is more favorable to a party than the sum offered. (*Bathgate v. Haskin*, 63 N. Y. 261; *Budd v. Jackson*, 26 How. Pr. 398; *Pike v. Johnson*, 47 N. Y. 1.)

In actions where the damages are unliquidated, the recovery should be compared with the offer, without adding interest to the offer and without discounting the amount of the recovery as shown in the verdict, report or decision. (*Johnston v. Catlin*, 57 N. Y. 652; 15 Ency. Pl. & Pr. 58; *Kelly v. Bonesteel*, 29 Hun, 546.)

The reason for considering interest in determining whether a verdict, report or decision is more favorable to a party than an offer of judgment is not that the party accepting an offer of judgment would have interest on the judgment from the time of its entry or the use of the sum offered if paid or collected, but interest is considered because the recovery as shown by the verdict, report or decision actually includes interest that has accrued between the service of the offer and the rendition of the verdict, or the filing of the report or decision. If in all cases interest should be taken into consideration because the person accepting the offer would have interest on the judgment or the use of the sum offered if paid, there would be no distinction between actions for liquidated damages and actions for unliquidated damages. Interest should only be computed for the purpose of comparison in cases where it is actually included in the recovery. If interest is not actually included in the recovery a deduction of an amount equal to the interest would be an injustice to the successful party in making the comparison. If interest had been included in the verdict of seventy-five dollars rendered in this case we should feel compelled to discount such interest before comparing the verdict with the offer. It appears, however, from the complaint that the plaintiff did not demand interest upon the amount claimed by him to be due from the defendant. It does not appear that the jury were in the possession of any facts from which interest could have been computed

by them if they had desired to do so, and it further appears from the charge of the court, a copy of which is included in the record, that nothing was said to them on the subject of interest, and the conclusion necessarily reached from the record before us is, that the verdict was rendered without any claim having been made for interest upon the balance due from the defendant to the plaintiff, and that the verdict as rendered did not include interest.

We are of the opinion that the plaintiff's recovery was more favorable to him than the offer of judgment, and that the defendant is not entitled to costs under said section 3070 of the Code of Civil Procedure.

Upon the facts stated the plaintiff is not entitled to costs under said section 3070 of the Code of Civil Procedure. (*McKuskie v. Hendrickson*, 128 N. Y. 555.)

Under section 3071 of the Code of Civil Procedure, where an appeal is taken from a judgment of a Justice's Court and a new trial is demanded in the County Court, after the expiration of ten days from the time of filing the justice's return, the action is deemed an action at issue in the appellate court. The general provisions relating to costs under section 3228 of the Code of Civil Procedure are applicable to actions in the County Court, but whether they are applicable to an action commenced in Justice's Court and brought into the County Court on a notice of appeal for a new trial has been a subject of considerable controversy and the decisions of the courts are not harmonious.

The respondent contends that where an appeal is taken from a judgment of the Justice's Court and a new trial is demanded in the County Court and sections 3070 and 3073 of the Code regulating costs on such appeals are inapplicable, the plaintiff if he recovers fifty dollars or more in the County Court is entitled to costs under section 3228 of the Code of Civil Procedure. The weight of authority seems to be in favor of the respondent's contention.

In *McKuskie v. Hendrickson* (*supra*), the court, in considering whether the plaintiff in that case was entitled to costs under section 3070 of the Code of Civil Procedure, said: "He is not entitled to costs by virtue of any general provision contained in section 3228 of the Code, because he did not recover as much as fifty dollars."

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In *Pierano v. Merritt* (148 N. Y. 289) the court, in considering a similar question and referring to *McKuskie v. Hendrickson* (*supra*), said: "It was intimated, however, that if the verdict had been for \$50 or more the plaintiff could have recovered costs under § 3228."

In *Fowler v. Dearing* (6 App. Div. 221) the court allowed costs to a plaintiff under said section 3228 where he recovered more than fifty dollars on a new trial in the County Court after an appeal from a judgment of a Justice's Court, and in referring to said section 3228 say: "In the case of *McKuskie v. Hendrickson*, already cited, there is a clear intimation by the Court of Appeals that this provision is applicable to suits in Justices' Courts. * * * In the former case the court said that the plaintiff was not entitled to costs by virtue of any general provision contained in section 3228 of the Code, 'because he did not recover as much as \$50,' thereby clearly implying that he would have been entitled to costs if the recovery had amounted to that sum. In *Pierano v. Merritt* (148 N. Y. 289) this intimation is referred to by VANN, J., without any suggestion of disapproval."

In default of other provision for costs the right to costs under said section 3228 in an action commenced in Justice's Court and retried in the County Court has been recognized in the following cases: *Birdsall v. Keyes* (66 Hun, 233); *Munson v. Curtis* (43 id. 214); *Snyder v. Hughes* (27 id. 373); *Quick v. Wixon* (Id. 592); *Brazee v. Town of Hornby* (27 Misc. Rep. 129); *Mattes v. Panse* (47 N. Y. St. Repr. 446); *Combs v. Combs* (25 Hun, 279).

The order should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOEL BRINK,
Respondent, v. EUGENE WAY and Others, Composing the Board
of Inspectors of Election in Election District No. 4 of the Town
of Ulster, Ulster County, New York, and Others, Appellants.

Election—when the inspectors and poll clerks have not performed their duty a peremptory writ of mandamus directing a recount and recanvass of the votes is proper—the existence of a remedy by action does not prevent its issue—mere irregularities not affecting the result do not call for it—the common-law powers of the court are not taken away by the statutory authority as to mandamus—what statements are insufficient as denials.

A candidate at a town election for the office of supervisor who, upon the face of the returns had been defeated by one vote, made a motion for a peremptory writ of mandamus to compel a recount and recanvass of the votes cast in one of the election districts. He alleged that the canvass in said district "was not conducted in the manner prescribed by the statute, in that the chairman of the board of inspectors did not take the split ballots separately and announce the vote for each candidate on each such ballot in the order of the offices printed thereon, and the poll clerks did not make any tally of the same; nor was* any of the split ballots passed to the other inspectors for verification; but the split ballots were read off by one of the inspectors * * * who was not the chairman, and they were tallied by inspectors" and not by the poll clerks; that the tally sheet in said district "is not filled out in the manner required by law in that it does not contain opposite the name of Joel Brink (the relator) or any other candidate on the Republican ticket under a column headed 'Number of votes cast and counted for each candidate on straight ballots' an entry of the number of straight party votes counted; nor does it contain under another column headed 'Number of votes cast and counted for each candidate on split ballots' entered by single marks grouped into five marks, the votes canvassed for said Joel Brink for the office of supervisor, but instead thereof there appears in such column the words 'Eleven votes' written in such column over something which has been erased therefrom."

The answering affidavits did not raise an issue of fact as to these allegations.

The relator, who was credited with having received but eleven votes in said district, produced the affidavit of fourteen persons to the effect that they had voted for him. It was not questioned but that the ballots had been preserved inviolate and that they could be recounted and recanvassed under the same conditions that existed at the time of the original count.

Held, that as the vote was not counted or returned in accordance with the statute, it was proper for the Special Term, in its discretion, to order that a peremptory writ of mandamus issue directing a recount and recanvass of the vote;

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That the rule that a mandamus will not be granted where a party has a remedy by action, is one addressed to the sound discretion of the court and is not of universal application;

That as a general rule mere irregularities in the mode of canvassing a vote at an election and making a return thereof will not vitiate the election;

That if the irregularities are the result of ignorance or inadvertence and they do not affect the result of the election, the court may refuse to take action for the purpose of compelling a recanvass of the vote in the specific manner directed by the statute;

That until the inspectors and poll clerks have canvassed the vote in the manner provided by statute, they have not performed the duty imposed upon them as ministerial officers;

That the statutory provisions authorizing proceedings by mandamus in election cases do not divest the court of its common-law jurisdiction to issue a writ of mandamus commanding the inspectors of election to convene and perform their duties as prescribed by statute;

That indefinite general statements, or mere conclusions of law or fact contained in the answering affidavits, were not sufficient, as denials, to raise an issue of fact.

APPEAL by the defendants, Eugene Way and others, composing the Board of Inspectors of Election in Election District No. 4 of the Town of Ulster, Ulster County, New York, and others, from an order of the Supreme Court, made at the Rensselaer Special Term and entered in the office of the clerk of the county of Ulster on the 23d day of November, 1903, directing the issuance of a peremptory writ of mandamus.

Linson & Van Buren [*Augustus H. Van Buren* of counsel], for the appellants.

W. N. Gill [*Howard Chipp* of counsel], for the respondent.

CHASE, J. :

The relator Brink and the defendant McNamee were respectively the Republican and Democratic candidates for the office of supervisor of the town of Ulster, Ulster county, at the biennial town election held with the general election November 3, 1903.

The town of Ulster is composed of four election districts. The returns from said election districts were canvassed by the justices of the peace and town clerk of said town and said justices of the peace and town clerk found that 333 votes had been cast for Brink and 334 votes for McNamee.

According to the returns filed from the fourth election district of said town, 207 votes were cast for supervisor, of which 11 were for Brink and 196 for McNamee, and such returns show that there were 99 split ballots cast in said election district, but that none of the ballots cast were blank or were rejected as void or marked for identification.

By subdivision 3 of section 110 of the Election Law (Laws of 1896, chap. 909, as amd. by Laws of 1898, chap. 335) it is provided: "The method of counting shall be as follows: The straight ballots, that is, the ballots on which all the candidates on one party ticket and no others are voted for, shall be separated from the split ballots and counted, and the number of straight party votes for each candidate shall be entered in gross opposite his name on each tally sheet by the poll clerk keeping the same. The chairman of the board shall then take the split ballots separately and announce the vote for each candidate on each such ballot in the order of the offices printed thereon, and each poll clerk shall make an accurate tally of the same. As the votes on each split ballot are counted, such ballot shall be passed to the other inspectors for verification. The poll clerks shall then add together all the votes for each candidate and the ballots wholly blank and void, together with the ballots on which no votes were counted for any candidate for such office, and shall enter the sum thereof in the proper column on the tally sheet. As soon as the count is completed for each office, the poll clerks shall submit the result to the inspectors for examination, and, if found to be correct, the chairman shall at once announce the result."

By section 84 of said Election Law it is provided: "Opposite and to the right of each party or independent ticket or list of candidates shall be a column headed, 'Number of votes cast and counted for each candidate on straight ballots,' in which column and opposite every name shall be entered the number of straight party votes counted (which number is the same for every candidate of that party). To the right of such column there shall be another column headed, 'Number of votes cast and counted for each candidate on split ballots,' and in such column there shall be entered by single marks, grouped into five marks, the votes canvassed for such candidates on the split ballots. To the right of such column shall be another column headed, 'Total number of votes cast and counted for each

candidate,' in which shall be entered, opposite the name of each candidate, the total number of votes cast and counted for such candidate on both straight and split ballots."

By subdivision 3 of section 103 of said Election Law it is provided: "The poll clerks shall also, during the canvass of the votes, as prescribed by section one hundred and ten of the Election Law, make and complete the tally sheets of the votes in the form provided by section eighty-four of the Election Law."

When town meetings are held at the time of the general election the duty of inspectors in canvassing the vote for the candidates for town offices is the same as their duty in canvassing the vote for other candidates. (See Town Law [Laws of 1890, chap. 569], § 42, added by Laws of 1898, chap. 363, and amd. by Laws of 1901, chap. 391.)

It is also provided that the statement of votes cast for town offices shall be made in the same form as the statement by such inspectors of the votes cast for other offices at the general election. (See Id. § 38, added as § 40 by Laws of 1893, chap. 82, amd. by Laws of 1893, chap. 456, renumbered by Laws of 1897, chap. 481, and amd. by Laws of 1899, chap. 168.)

The relator alleges that the canvass in said fourth district "was not conducted in the manner prescribed by the statute, in that the chairman of the board of inspectors did not take the split ballots separately and announce the vote for each candidate on each such ballot in the order of the offices printed thereon, and the poll clerks did not make any tally of the same; nor was* any of the split ballots passed to the other inspectors for verification; but the split ballots were read off by one of the inspectors * * * who was not the chairman, and they were tallied by inspectors" and not by the poll clerks.

The relator also alleges that the original tally sheet from said district "is not filled out in the manner required by law, in that it does not contain opposite the name of Joel Brink or any other candidate on the Republican ticket under a column headed 'Number of votes cast and counted for each candidate on straight ballots' an entry of the number of straight party votes counted; nor does it contain under another column headed 'Number of votes cast and

* *Sic.*

counted for each candidate on split ballots' entered by single marks grouped into five marks, the votes canvassed for said Joel Brink for the office of supervisor, but instead thereof there appears in such column the words 'Eleven votes' written in such column over something which has been erased therefrom."

The facts on which such allegations are based are stated with some detail in the affidavits filed by the relator.

The answering affidavits, so far as they relate to the above-mentioned allegations of the relator are not specific, but are indefinite general statements or mere conclusions of law or fact. They are not sufficient as denials to make an issue of fact. (*People ex rel. Beck v. Coler*, 34 App. Div. 167.)

The relator produces affidavits of fourteen persons, not including either of the inspectors, ballot or poll clerks or watchers, who severally state that they voted in said election district on said day for the relator for supervisor. The relator also alleges that one of the watchers was compelled by force to leave the room in which the election was held; that persons voted who had not been registered; that at least twenty-four votes were cast in said election district for him as a candidate for supervisor; that by error or design some of said votes so cast for him were erroneously counted for said McNamee; that said McNamee handled some of the tickets voted in said election district during the canvass thereof; that statements were made by him and by the inspectors during and after the canvass inconsistent with the returns filed by the inspectors, and other statements are made in the moving affidavits tending to discredit said returns, all of which statements, however, are denied by the defendants.

No question is raised in the affidavits before the court but that the ballots voted were replaced in the box from which they were taken and have been preserved inviolate as required by section 111 of the Election Law, and that the same can now be recounted and recanvassed under the same conditions that existed at the time when they were counted immediately following the close of the polls on election day.

The order appealed from directs that the town clerk deliver the box containing said ballots to the board of inspectors; that the poll clerks and inspectors convene, open said box and recount and recanvass said ballots in the manner directed by the statute so far as they

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relate to the office of supervisor and make a return thereof as required by statute, and that the board of town canvassers reconvene and recanvass the vote of said election district from the corrected returns so to be made by said board of inspectors after such recount and recanvass.

The court at Special Term exercised its discretion in favor of directing that a peremptory mandamus issue. The rule that a mandamus will not be granted where the party has a remedy by action is one addressed to the sound discretion of the court and is not of universal application. (*People ex rel. Beck v. Coler, supra*; *People ex rel. Maxim v. Ward*, 62 App. Div. 531.)

As a general rule, mere irregularities in the mode of canvassing the vote of an election and making a return thereof will not vitiate an election. (*People v. Cook*, 8 N. Y. 67.) When irregularities are the result of ignorance or inadvertence and they do not affect the result of an election, the court may refuse to take any action for the purpose of compelling a recanvass of the vote in the specific manner directed by the statute. The provisions of the statute relating to the manner of canvassing and returning the vote of an election, however, are for the purpose of preventing fraud and mistake. Such directions to inspectors and poll clerks should be complied with, and where irregularities relating thereto afford an opportunity for fraud or mistake in counting the votes and the proof is not reasonably clear that the count was honest and correct, an order of the court at Special Term directing a recount and recanvass of the vote should not be reversed on appeal. The statutory directions for the preservation of the ballots are for the purpose of retaining the evidence which will conclusively show whether an error has been made in the canvass. We repeat what was said by this court in *People ex rel. Maxim v. Ward (supra)*, "All proof of errors committed by the board of canvassers in the count of the ballots, if any errors were committed, is contained in that ballot box. The contents of the box and, hence, all the proof, is at the disposal of the court and subject to its mandate."

The vote was not counted or returned in accordance with the statute. (*Matter of Larkin*, 46 App. Div. 366.) It was the duty of the inspectors and poll clerks to canvass the vote in the manner provided by statute, and until they have so counted the vote the

duty imposed upon them as ministerial officers has not been performed.

It was said in *Matter of Bradhurst v. First G. S. W. T. R. Co.* (16 Johns. 8): "It has been frequently decided that when the Legislature confer a power on any inferior tribunal, the exercise of which may affect the rights of person or property, notwithstanding their decision may be declared to be final, yet this court, like that of the Court of K. B., has a general superintending control over its proceedings."

The courts not only frequently so decided prior to that early day; but have continued to so decide to the present time. (10 Am. & Eng. Ency. of Law [2d ed.], 807; *People ex rel. Sanderson v. Payne*, 12 Abb. N. C. 103; *People ex rel. Ranton v. City of Syracuse*, 88 Hun, 203; *People ex rel. Nichols v. Board Canvassers*, 129 N. Y. 395; *People ex rel. White v. Aldermen*, 31 App. Div. 438, S. C., 157 N. Y. 431; *Baird v. Supervisors, etc.*, 138 id. 95; *People ex rel. Harris v. Commissioners*, 149 id. 26; *Matter of Stewart*, 155 id. 545; *People ex rel. Maxim v. Ward, supra*; *Matter of Larkin, supra*; *People ex rel. Perry v. Board of Canvassers*, 88 App. Div. 185.)

The statutory provisions authorizing proceedings by mandamus in election cases do not divest the court of its common-law jurisdiction to issue a writ of mandamus commanding the inspectors of election to convene and perform their duties as prescribed by statute. (*People ex rel. White v. Aldermen, supra*; *Matter of Stewart, supra*.)

The order should be affirmed, with ten dollars costs and disbursements.

Order unanimously affirmed, with ten dollars costs and disbursements.

RICHARD A. GRAY and Others, Respondents, v. YORK STATE TELEPHONE COMPANY, Appellant, Impleaded with the EASTERN ELECTRICAL CONSTRUCTION COMPANY.

Telephone poles on a rural highway — they constitute an added burden on the fee thereof — injunction.

The erection of a telephone line on a public highway, not within the bounds of a city or village and the fee of which is in the abutting owners, imposes an added burden upon the highway and if the telephone company attempts to construct the line without obtaining the consent of the abutting owners, or instituting condemnation proceedings, the abutting owners are entitled to injunctive relief.

APPEAL by the defendant, the York State Telephone Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Broome on the 1st day of August, 1903, upon the decision of the court, rendered after a trial at the Broome Special Term, awarding the plaintiffs a perpetual injunction.

Plaintiffs are the owners of certain real property situated in the town of Union, county of Broome, containing 140 acres, together with the highway adjoining said real property, subject only to the right of the public therein for highway purposes. The defendant, the York State Telephone Company, is a domestic corporation organized under the Transportation Corporations Law (Laws of 1890, chap. 566), and owns and operates a telephone system and telephone exchange in the cities of Binghamton and Elmira respectively. Said defendants are erecting poles and constructing a line of telephone wire between the city of Binghamton and the city of Elmira for the purpose of connecting and extending the business of said defendant York State Telephone Company.

In February, 1903, negotiations were had between the defendants and plaintiffs relating to the purchase of a right of way by the defendant York State Telephone Company for its telephone poles and wires over the said highway, the fee of which is owned by the plaintiffs, but they were unable to agree upon the compensation to be paid therefor. Defendants then attempted to construct its line over said highway so adjoining the plaintiffs' real property, and

when the defendants had the telephone poles in part erected this action was commenced, and the defendants were enjoined from erecting and maintaining and operating a telephone line across said premises, and from taking or attempting to take or hold possession of any part of plaintiffs' said property, and from erecting a telephone line thereon, and from digging holes, placing crossarms and stretching wires on said poles, and from doing any other act on said premises tending to incumber them or to prevent the free and unobstructed use thereof by the plaintiffs as they were theretofore used and enjoyed by them. An answer was served by the defendants, and after a trial of the issues joined thereby judgment was directed and entered permanently enjoining the defendants from erecting and maintaining its poles and line on and over said property, from which judgment this appeal is taken. The highway is a rural public highway, and not within the bounds of a city or village.

Roberts, Tuthill & Rogers [*Theodore R. Tuthill* of counsel], for the appellant.

Robert B. Richards [*Richard H. Thurston* of counsel], for the respondents.

CHASE, J.:

The appellant contends that erecting telephone poles in a rural public highway and stringing wires thereon is not an added burden to the owners of adjoining real property, having the title to the fee of the highway within the bounds of which the poles are set and over which the wires are run.

A discussion of the subject in this court seems unnecessary, for the reason that the Court of Appeals in *Eels v. A. T. & T. Co.* (143 N. Y. 133) has clearly held against the appellant's contention. The material facts in that case are very similar to the facts in this case, and the court in that case held that a telephone and telegraph company had no right to appropriate a public highway to its own special and continuous use by erecting poles therein and stringing wires thereon without the consent of the owner of the fee of the highway, and without acquiring the right so to do by condemnation proceedings. (See, also, *Peck v. Schenectady R. Co.*, 67 App. Div. 359;

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S. C., 170 N. Y. 298; *Paige v. Schenectady R. Co.*, 77 App. Div. 571.)

An injunction may be issued at the suit of the owners of the fee of a highway to prevent persons or corporations from erecting a telephone line on and over the same for continuous and permanent use. (*Paige v. Schenectady R. Co.*, *supra*; *Peck v. Schenectady R. Co.*, *supra*.)

Even if the court has a discretion in regard to granting an injunction in a case where the facts are substantially undisputed, such discretion in this case has been exercised by the Special Term in favor of granting the injunction, and there is nothing before us to show that such discretion was improperly exercised or abused.

The judgment should be affirmed, with costs.

Judgment unanimously affirmed, with costs.

MORRIS ULLMAN and Others, Appellants, v. CHARLES E. CAMERON and ALBERT L. CAMERON, as Trustee under the Last Will and Testament of JANE M. CAMERON, Deceased, Respondents.

Trust giving the beneficiary the right, on notice to the trustee that he desires to use the trust fund in his business, to have such principal—the title to the trust fund, whether real or personal, vests in the beneficiary—creditor's action to enforce a judgment against the fund—when the fact that residuary legatees are not made parties is not a ground of objection—burden of proof that they are alive.

A testatrix devised all her estate, which consisted entirely of personal property, to her executor, Albert L. Cameron, in trust for the following purposes:

"*Second.* I hereby will and direct the said Albert L. Cameron to pay over to my husband, Charles E. Cameron, semi-annually, all of the income, rents, issues and profits of my said estate, and so much of said principal sum as may be necessary for his support and maintenance for and during the term of his natural life.

"*Third.* I further will and direct that whenever the said Charles E. Cameron shall desire to engage in any business or enterprise, and shall give notice—thus—to the said Albert L. Cameron, that he desires the whole or any part of such principal sum—for such purpose, it is my will and in that case I hereby direct the said Albert Cameron to pay over and deliver to the said Charles E. Cameron the amount so desired by him out of the principal sum so given to him in trust by the first clause hereof."

The will further provided that the trustee should pay all the funds that remained in his hands after the death of Charles E. Cameron to certain residuary legatees.

Held, that a valid trust was created by the 2d clause of the will;

That the provision of the 3d clause of the will giving Charles E. Cameron the right to demand possession of the fund if he desired to engage "in any business or enterprise," was so broad and so personal to the beneficiary that it was equivalent to a direction that he was entitled to possession of the fund whenever he asked for it;

That if the trust fund consisted of realty, an attempt to give the beneficiary absolute control over the trust fund, would, under sections 72, 73 and 129 of the Real Property Law (Laws of 1896, chap. 547), have rendered the entire trust void and caused the title to the whole property to vest in the beneficiary instead of in the trustee;

That, although the trust fund consisted entirely of personal property, the same principle would be applied;

That a judgment dismissing a complaint, in an action brought by a judgment creditor of the beneficiary to enforce his judgment against the trust fund, would not be sustained upon the ground that the residuary legatees had not been made parties to the action, it appearing that, although that defense was set up in the answer, no evidence was given that the legatees were living and also that the decision of the trial court was placed upon the sole ground that the beneficiary had no property in the trust fund;

That a defense that necessary parties are not joined is in the nature of a plea of abatement and must be proved.

HOUGHTON, J., dissented.

APPEAL by the plaintiffs, Morris Ullman and others, from two judgments of the Supreme Court, one in favor of the defendant Charles E. Cameron, entered in the office of the clerk of the county of Madison on the 19th day of August, 1903, and the other in favor of the defendant Albert L. Cameron, as trustee under the last will and testament of Jane M. Cameron, deceased, entered in said clerk's office on the 8th day of September, 1903, upon the decision of the court, rendered after a trial at the Madison Special Term, dismissing the complaint upon the merits.

T. B. Merchant and *L. M. Merchant*, for the appellants.

M. H. Kiley, for the respondent Charles E. Cameron.

D. W. Cameron, for the respondent Albert L. Cameron.

PARKER, P. J. :

The plaintiffs in this action on July 11, 1901, recovered a judgment against the defendant Charles E. Cameron for \$561.02, and

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seek to collect the same from a certain fund in the custody of the defendant Albert L. Cameron, and which it is claimed he holds as trustee for said Charles E. Cameron under the will of Jane M. Cameron, deceased, who was his wife. At the time of her death the fund consisted entirely of personal property, and the provisions of the will under which such trust is claimed are as follows:

"*First.* I hereby give, devise and bequeath all of my estate, both real and personal, of every name, kind and nature whatsoever, in trust for the uses and purposes hereinafter named to Albert L. Cameron, of Smithfield, N. Y., my executor hereinafter named.

"*Second.* I hereby will and direct the said Albert L. Cameron to pay over to my husband, Charles E. Cameron, semi-annually, all of the income, rents, issues and profits of my said estate, and so much of said principal sum as may be necessary for his support and maintenance for and during the term of his natural life.

"*Third.* I further will and direct that whenever the said Charles E. Cameron shall desire to engage in any business or enterprise, and shall give notice — thus — to the said Albert L. Cameron, that he desires the whole or any part of such principal sum — for such purpose, it is my will and in that case I hereby direct the said Albert Cameron to pay over and deliver to the said Charles E. Cameron the amount so desired by him out of the principal sum so given to him in trust by the first clause hereof."

The will further provided that all of such trust fund that remained in the hands of the trustee after the death of her said husband should be paid over by him to certain residuary legatees therein named.

The 1st and 2d clauses above quoted, it may be conceded, constitute a valid trust. Under subdivision 3 of section 76 of the Real Property Law (Laws of 1896, chap. 547) such a trust is allowed as to real estate, except perhaps as to the provision allowing a portion of the *principal sum* to be semi-annually applied, in the discretion of the trustee, to said Cameron's support, and as to personal property such a provision is possibly a valid disposition of the same. The appellant, however, claims that the effect of the 3d clause is to vitiate the whole bequest and render the attempted trust invalid.

If the subject-matter of the trust had been real estate, and such 3d clause had provided that, whenever said Charles E. Cameron desired,

the said trustee should pay over to him the whole of said trust fund, it would have rendered the trust an invalid one under the rule stated in *Wendt v. Walsh* (164 N. Y. 154). The title to the whole property, under the provisions of sections 72, 73 and 129 of the Real Property Law, would then have vested in Charles E. Cameron instead of in the trustee. The question arises whether, under the language actually used in such 3d clause, the same result should not follow. Under section 73, if the *intent* of the bequest was that the *possession*, as well as the profits of the fund was to vest in Charles E. Cameron, then it should have been made directly to him, and no estate whatever vested in the trustee. So by section 72, if Charles E. Cameron was entitled to the *possession* as well as the profits of the fund bequeathed, he must be deemed to have the legal estate therein to the same extent as the beneficial interest given him thereby.

Now, he was evidently entitled to the possession of such fund if he demanded it for the purpose of engaging "in any business or enterprise;" and it seems to me that such a purpose is so broad and so personal to the beneficiary that it is equivalent to a direction that he is entitled to it whenever he asks for it. The term of the trust seems to depend entirely upon the will of the beneficiary. He may end the trust and take possession absolutely whenever he desires to; that is, whenever he notifies the trustee that he wishes the fund to use in his business. And having the right to ask at any time, the situation seems to be practically like that presented in *Wendt v. Walsh* (*supra*).

But the property disposed of by the will was personal property only, and the further question is presented whether a similar principle should be applied to it.

Had the bequest been such as is contained in the 1st and 2d clauses only, under the provisions of section 3 of the Personal Property Law (Laws of 1897, chap. 417), so much of the income as was needed for the support of the beneficiary and his family could not be reached by his creditors, but the surplus might be so reached. (See, also, *Tolles v. Wood*, 99 N. Y. 616; *Hallett v. Thompson*, 5 Paige, 583; *Wetmore v. Truslow*, 51 N. Y. 338; *Williams v. Thorn*, 70 id. 270; *Schenck v. Barnes*, 156 id. 316, 320.)

But the 3d clause so completely changes the character of the

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trust that, as suggested above, it substantially becomes a mere naked trust, and as provided in such 3d section, it becomes such an "other trust" as may be transferred by the beneficiary, and hence is applicable to the claims of his creditors. (*Williams v. Thorn*, 70 N. Y. 270, 278.) It is not protected by the provisions of such 3d section and, in analogy to the rule laid down in the Real Property Law, the title should be deemed to vest in the beneficiary and not in the trustee. In *Hallett v. Thompson* (*supra*, 587) it is said: "It is very obvious from the terms in which the bequest was made, that the object of the testatrix was not to secure to the legatee a support and maintenance out of the interest, or income, of a trust fund, which should be inalienable by the *cestui que trust*, in analogy to the provision before referred to in relation to a similar trust to receive the rents of real estate for the same object. On the contrary, it was an attempt to give to the legatee an absolute and uncontrollable interest in personal estate, and at the same time to prevent its being subject to the usual incidents of such an absolute right to property, so far as the rights of creditors are concerned. This cannot be done, consistently with public policy, or the settled rules of law." Hence I conclude that the property in question belonged to the beneficiary and was liable for his debts.

It is further urged that the residuary legatees named in such will were necessary parties, and that not having been joined in this action, it cannot be maintained by the plaintiff.

Although that defense is set up in the answer, there is no evidence in the case that either of such legatees was living at the time of the commencement of this action, and the trial judge has made no finding of fact nor of law upon that question. He has placed his decision upon the sole ground that the beneficiary had no property in the fund sought to be reached.

A defense that necessary parties are not joined is in the nature of a plea in abatement, and, like all issues tendered, it must be proven. We cannot now hold that the complaint ought to have been dismissed because the residuary legatees named in the will were not made parties, when we do not know that either of them was living when the action was commenced. Concede that no judgment should be rendered against the validity of this trust unless such residuary legatees, or their successors, are before the court, nevertheless, the

fact that they were not made parties cannot be invoked upon this appeal to sustain the decision made by the trial judge, which dismisses this complaint upon the merits.

The judgment should be reversed, with costs, and a new trial granted, with costs to the appellants to abide the event, which will give to the trustee an opportunity to have such residuary legatees brought in and such a judgment rendered as will be binding upon them and a protection to himself.

All concurred, except HOUGHTON, J., dissenting.

Judgment reversed and new trial granted, with costs to appellants to abide event.

BENJAMIN E. HALL, Appellant, v. THE STATE OF NEW YORK,
Respondent.

Condemnation of land — what continuity of use of a dam is sufficient to establish a prescriptive right to flood land, and is inconsistent with an intention to abandon that right — increase of an award by the Court of Claims.

Where the owners of land on the Saranac river have for upwards of fifty years maintained a dam across the river which, at all times when it suited their convenience to do so, set the waters of the river back upon the adjacent property of other owners, the validity of the prescriptive right thus obtained to flood the adjacent uplands is not affected by the fact that the flooding has not been absolutely continuous during all that time because of breaks and leakages in the dam, and because the water has been let out of the dam at certain times for the purpose of floating logs into the river below, where it does not appear that these periodical cessations in the continuity of the flooding were made with the intention of abandoning the right to do so, or were the result of any act or interference on the part of the owners of the flooded uplands.

Quare, as to the right of the Appellate Division, upon an appeal from a judgment of the Court of Claims, to modify such judgment by increasing the award.

APPEAL by the plaintiff, Benjamin E. Hall, from a judgment of the Court of Claims of the State of New York in favor of the plaintiff for \$2,958.80, entered in the office of the clerk of said court on the 15th day of September, 1903, the amount of the award being claimed by the appellant to be insufficient.

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Walter B. Safford and Frederic R. Kellogg, for the appellant.

John Cunneen, Attorney-General, and S. S. Taylor, for the respondent.

CHESTER, J.:

The claimant and his sister, Ermina P. Hall, were owners of certain lands on both sides of the Saranac river. About sixty acres of these lands, including an undeveloped water power thereon, were appropriated by the State, pursuant to chapter 627 of the Laws of 1898. Such appropriation was made on the 13th day of December, 1898. The owners and the State were unable to agree upon the value of the property so appropriated or on the amount of damages resulting therefrom. Ermina P. Hall thereafter assigned to the claimant all her interest in the claim for damages for such appropriation, and under the law the claimant presented the claim to the Court of Claims for determination. The case has been twice tried by that court. Upon the first trial the claimant was awarded \$2,000 damages for the land appropriated. An appeal was taken from that judgment to this court, where the judgment was reversed upon the ground that the Court of Claims adopted an erroneous basis of value in fixing the damages. (*Hall v. State of New York*, 72 App. Div. 361.)

One of the questions involved in the former appeal was whether the owners had acquired by prescription the right to erect a dam at the place in question, which would set the water of the stream back and thereby overflow lands belonging to others, and it was decided that they had acquired such right, and that such a right was appurtenant to the lands and passed under a conveyance thereof. It was also decided that the claimant had not, by non-user, lost such right and that the evidence showed no intention to abandon it.

The case has been again tried by the Court of Claims, and, notwithstanding the former decision of this court, upon evidence not essentially different from that on the former trial, but covering more completely the questions presented, that court has held that the claimant and his predecessors in title had acquired no prescriptive right to maintain a dam for the entire year, but for only

eight months of the year, and that without the right to maintain the dam for the entire year the claimant had no merchantable water power which could be made the basis of damages. Nothing was, therefore, awarded him for the water power. This appears to be squarely in the face of the principle established by this court upon the former appeal, and which, until reversed, must stand as the law of the case.

Without attempting to review the evidence it is sufficient to say that to our minds it shows clearly that for upwards of fifty years the predecessors in title of the claimant and those acting with them had maintained a dam at the place in question nine and one-half feet high which set the waters back upon the adjacent property of other owners at all times when it suited their convenience to do so. While the evidence does not show that the flooding had been absolutely continuous during all of that time because of breaks and leakages in the dam and because of letting the water out of the dam at certain times to float logs in the river below, it does show that these persons exercised the right to overflow the lands during that time at will. There is nothing in the evidence that these periodical cessations in the continuity of the flooding showed any intention of abandoning the right to flood whenever they desired. Nor did such cessation come from any act or interference of the owners of the uplands. The fact of flooding and of impounding the waters and of their use appear to have been dependent wholly upon the pleasure and will of the owners and of the persons operating the dam by their leave. Under such circumstances there is no interruption in the continuity of the user or abandonment of the right to use. Non-user does not affect the right to the easement unless the circumstances show an inference of abandonment. There must be an overt act indicating that the right is disturbed. (Jones Easement, § 189; Washb. Easement, [4th ed.] 170-172.)

It is said in the American and English Encyclopædia of Law (Vol. 28 [1st ed.], 1009) that "the adverse use in order to ripen into prescriptive right must be continuous during the whole period. But this does not mean that it must be constant in the sense of daily use. When one uses the water whenever he sees fit without asking leave or without objection, the use is sufficiently continuous and a grant may be presumed."

The same principle is held in numerous other authorities. (*Cornwell Mfg. Co. v. Swift*, 89 Mich. 503; *Messinger's Appeal*, 109 Penn. St. 290; *Bodfish v. Bodfish*, 105 Mass. 317; *Hesperia Land, etc., Co. v. Rogers*, 83 Cal. 10; *Garrett v. Jackson*, 20 Penn. St. 331.)

While the questions of non-user and of abandonment were not discussed at length in the opinion upon deciding the former appeal, yet they were involved therein the same as here and necessarily entered into the decision there made, which was adverse to the contention of the State. The evidence upon these questions, while of much greater length on the last trial than on the first, is not materially different from that considered by the court upon the former appeal, where it was decided that the claimant had a prescriptive right to maintain his dam and to overflow the uplands. That decision must control the determination of this appeal.

The inconsistency of the State is clearly shown in its insisting that the claimant has no prescriptive right in order to reduce the compensation it should make to him, and then after taking his property away from him for a public use in proceeding at once to the erection of a dam at the place in question without any right whatever to do so, other or different from that possessed by the claimant or his predecessor in title. At the time it took his property the prescriptive right which the claimant had to maintain a dam there was a property right for which he was entitled to receive just compensation. That has been denied him in the court below and he has simply been awarded what his property was worth per acre for camp sites.

There was testimony that the dam, the reservoir made thereby and the water power were valuable for storage of water for uses below on the river, for generating electricity, for saw mill and for other manufacturing purposes. Several witnesses as to value testified on behalf of the claimant. One expert witness, who had been a former State engineer and surveyor, valued the right to build a dam nine and a half feet high and of the water power that would be produced by such a dam at the time of the appropriation by the State at the sum of \$30,000. That estimate of value was, to a considerable extent, based upon the belief that there was a market in that vicinity for electricity that could be generated by such a water power. There is no very satisfactory evidence on behalf of the

State in this record in denial of the fact that there was such a market. Upon another trial, however, it may appear more clearly just how much of a market is accessible there and how much competition would be met in that neighborhood in the sale of electricity or of electric power.

While we may have the power to modify a judgment by increasing the award made by the Court of Claims, upon findings of that court justifying such increase (*Sayre v. State of New York*, 123 N. Y. 291), we do not think that in a case where there are no findings and where the evidence might be materially changed upon another trial we should do that.

The judgment should be reversed on the law and on the facts and a new trial granted in the Court of Claims, with costs of the appeal to the claimant.

All concurred.

Judgment reversed on law and facts and new trial granted in the Court of Claims, with costs of the appeal to the claimant.

DANIEL KLINGER, JR., Respondent, v. UNITED TRACTION COMPANY
and SCHENECTADY RAILWAY COMPANY, Appellants.

Negligence — a passenger on a street car injured by a collision between such car and a car attempting to pass by a crossover switch, due to its rear truck following the switch track instead of the main track — liability of the one company owning the railroad and of the other using it under a traffic agreement — respective obligation, to the person injured, of the two companies — res ipsa loquitur — excessive speed.

In an action brought against the United Traction Company and the Schenectady Railway Company, to recover damages for personal injuries sustained by the plaintiff, it appeared that the United Traction Company operated a double-track street railway in the city of Albany, and that the Schenectady Railway Company operated its cars over the traction company's tracks under a traffic agreement which devolved upon the traction company the duty of keeping in repair the tracks and switches; that at the time in question the traction company was engaged in repairing a portion of its west-bound track, and that both east and west-bound cars were obliged to use the east-bound track; that one of the traction company's west-bound cars, upon which the plaintiff was a passenger, had crossed over to the east-bound track and proceeded to the east

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end of a permanent crossover leading from the east-bound to the west-bound track; that an east-bound car of the Schenectady Railway Company had just been transferred over the permanent crossover to the west-bound track and had stopped with its east end about ten feet west of the west end of the crossover; that some person, apparently acting on behalf of the traction company, threw the point of the tongue of the switch in the crossover, so that the Schenectady company's car could be run easterly on the west-bound track past the permanent switch, for a distance sufficient to permit the traction company's car to cross over to that track and proceed westerly thereon; that there being a steep grade descending toward the east, the motorman of the Schenectady car started it by letting off the brake without applying any power; that the front trucks of the car passed over the tongue of the switch properly, but that when the rear trucks reached the tongue it had evidently moved out of position, so that the rear truck took the crossover instead of the west-bound track, throwing the rear end of the car against the traction company's car and causing the plaintiff to receive injuries.

Held, that a judgment against both defendants should be affirmed;

That the plaintiff, being a passenger on one of the traction company's cars, that company was bound to use the utmost human skill and foresight with reference to maintaining, operating and keeping in repair its tracks and switches, in order to save him from harm;

That the tongue of the switch having failed to remain in position, or having been misplaced because of some unexplained or unascertained cause, it was not incumbent upon the plaintiff, as against the traction company, to show the cause of the displacement;

That, under the doctrine of *res ipsa loquitur*, the traction company was required to explain the cause of the displacement, in order to relieve itself from the presumption that its negligence caused the accident;

That, with respect to the plaintiff, the Schenectady Railway Company was only bound to use reasonable and ordinary care with respect to the circumstances confronting it at the time;

That it bore the same relation to the plaintiff as if he had been driving his own horse and wagon upon the street instead of being a passenger upon one of the traction company's cars;

That, in view of the heavy down grade, the weight of the Schenectady car, and the knowledge of the motorman that the switch was not fitted with appliances to hold the tongue in place, and that, when running against the point of the tongue instead of against the heel thereof, he was using the switch in a manner in which it was not intended to be used, reasonable and ordinary care required the motorman to proceed very slowly and to keep his car under control;

That, under the circumstances, negligence on the part of the motorman might be based upon the fact that he testified that his car was moving about three or four miles an hour when he discovered that the rear truck had taken the crossover.

HOUGHTON, J., dissented as to the liability of the Schenectady Railway Company.

SEPARATE APPEALS by the defendants, the United Traction Company and the Schenectady Railway Company, from a judgment of the Supreme Court in favor of the plaintiff for \$850 damages besides costs, entered in the office of the clerk of the county of Albany on the 9th day of September, 1903, upon the report of a referee.

The defendant traction company owns and operates a double-track surface railway in various streets in the city of Albany, including State street, Eagle street and Washington avenue. The defendant, the Schenectady Railway Company, by a traffic agreement between it and the defendant traction company, runs its cars over the tracks of the latter company on the streets named. Under the traffic agreement between the two defendants the duty was devolved upon the traction company of keeping the tracks and switches in connection therewith, over which the cars of the two companies were operated, in repair. Each of the defendants operated and managed its own cars by its own employees.

The plaintiff while a passenger in one of the traction company's cars was injured by a collision between that car and a car operated by the Schenectady Railway Company. On the 8th day of September, 1903, the day of the accident, the traction company was engaged in replacing the old rails of the west-bound track on the curve at State and Eagle streets with new rails and for that reason at that time there was but one track in use at that place and the entire traffic during the repairs to the track at that point was necessarily conducted on the east-bound track. The traction company had a permanent crossover switch on Washington avenue north of Capitol park from the east to the west-bound track west of the place where the west-bound track had been taken up, and to facilitate the transfer of cars to the track so being used the traction company put in a temporary crossover below Eagle street, on which east-bound cars crossed from the west to the east-bound track. The switch tongue at the permanent crossover was three or four feet long, secured by a pin at the heel or easterly end thereof, movable in an iron plate upon which it rested, so that when the tongue was placed against the rail of the main track it formed a complete joint and a continuation of the main track. The traction company's car, upon which the plaintiff was a passenger, was one bound westerly. It crossed

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by the use of the temporary crossover below Eagle street to the east-bound track and stopped near the east end of the permanent crossover north of Capitol park. The Schenectady Railway Company's car came from the west on the east-bound track and had been transferred over the permanent crossover to the west-bound track and stopped with its east end about ten feet west of the west end of that crossover. Some person, apparently acting on behalf of the traction company, threw the point of the tongue of the switch in the west-bound track so that the car could run down easterly on that track for a distance sufficient to permit the traction company's car to be switched over to it and proceed westerly thereon. The grade at that point was about three feet in one hundred descending towards the east. The motorman on the Schenectady car, after receiving the signal to start, started his car by letting off the brake, without applying any power. The front trucks of his car passed over the tongue properly but when the rear trucks reached it it had evidently moved out of its position from the rail far enough for the flange of the wheel to enter and so the rear truck went down on the crossover throwing the rear end of the car over on the other track and the result was a collision between the car and the traction company's car which was standing east of the crossover on the east-bound track, and the plaintiff was thereby injured.

The plaintiff has secured a judgment against both defendants and each of them appeal separately.

Lewis E. Carr and *James O. Carr*, for the appellant Schenectady Railway Company.

Patrick C. Dugan, for the appellant United Traction Company.

Richard O. Bassett, for the respondent.

CHESTER, J.:

The plaintiff was injured while a passenger on one of the traction company's cars. While it is true that his injuries were received by reason of a collision between this car and one operated by the Schenectady Railway Company, yet the primary cause of the injury was the misplacement, or the failure to remain where it was placed, of the tongue of the switch maintained and operated by the traction company, and we think it is a fair inference from the

testimony that such misplacement was caused by the concurring negligence of both defendants. Each of the defendants on the trial engaged in an effort to cast the blame for the plaintiff's injuries upon the other.

The case must be considered having regard to the difference in the degree of care which the defendants were bound to exercise in relation to the plaintiff under the law. He having been a passenger on one of the traction company's cars, that company was bound to the exercise of the utmost human skill and foresight with reference to maintaining, operating and keeping in repair its tracks and switches in order to save him from harm. (*Palmer v. D. & H. C. Co.*, 120 N. Y. 170; *Coddington v. Brooklyn Crosstown R. R. Co.*, 102 id. 68; *Zimmer v. Third Ave. R. R. Co.*, No. 1, 36 App. Div. 265; *Koehne v. N. Y. & Queens Co. R. Co.*, 32 id. 419.) And the tongue of the switch having failed to remain in position or having been misplaced, because of some unexplained or unascertained cause, it was not incumbent upon the plaintiff, as against the traction company at least, to show the cause of its being misplaced, but under the doctrine of *res ipsa loquitur* that company was required to explain its cause in order to relieve itself from the presumption of negligence in causing the accident. (*Breen v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 297; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 id. 562; *Caldwell v. New Jersey Steamboat Co.*, 47 id. 282; *Holbrook v. Utica & Schenectady R. R. Co.*, 16 Barb. 113; *Gilmore v. Brooklyn Heights R. R. Co.*, 6 App. Div. 117.)

The Schenectady Railway Company, on the other hand, was bound to the exercise of reasonable and ordinary care only under the circumstances which confronted it at the time. It bore the same relation to the plaintiff as if he had been driving his own horse and wagon upon the street instead of being a passenger on one of the traction company's cars. (*Unger v. Forty-second St., etc., R. R. Co.*, 51 N. Y. 497; *Seagriff v. Brooklyn Heights R. R. Co.*, 31 App. Div. 595.)

Within these principles of law it seems to me that there was sufficient evidence before the learned referee to justify his conclusions that each of the defendants was guilty of negligence and that the negligence of each contributed to the plaintiff's injuries.

The negligence charged against the Schenectady Railway Com-

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pany in the complaint was that its car ran at an excessive rate of speed; that it was a defective car, and that its employees upon the car were negligent.

There was no proof that it was a defective car, but there was proof given on behalf of the plaintiff that would justify the inference of negligence on the part of the employees upon the car, growing out of the rate of speed at which the car was allowed to run at the time of the collision. The car had been switched over from the east-bound track to the west-bound track and stopped at a point about ten feet west of the westerly end of the permanent crossover. The traction company's car was standing still on the east-bound track close to the east end of the crossover. Some one, presumably in the employ of the traction company, threw the tongue of the switch at the westerly end of the crossover and the Schenectady Company's car was started in its attempt to run down easterly upon the west-bound track. McGraw, its motorman, saw that the switch was set for that track. He saw the traction company's car standing at the other end of the switch seventy-five or eighty feet away; he knew that he was running against the point of the tongue of the switch, and not against the heel, and in a way that it was not intended to be used. He knew that it had no rubber or block in the switch to hold the tongue in place. His car was a very heavy one, about twice the weight and about twice the length of the traction company's car. It had a double set of trucks of four wheels each, one set at either end of the car, which was from fifty to sixty feet long. It was a heavy down grade. Under such circumstances reasonable and ordinary care would require him to proceed very slowly and to keep his car under control, so that the weight and the speed of the car would not jar the tongue from its position or misplace the switch, or if it did do that, so that his car might be stopped before injury had been done to a car standing so near upon the other track. Yet he swore that his car was moving about three or four miles an hour when he discovered the rear truck had taken the crossover. This was evidently true when the force of its contact with the traction company's car is considered. The rear end of his car hit the westerly end of the traction company's car, knocked it off the track, burst it in and shoved it sideways from fifteen to twenty feet from the position it occupied. The front end

of his car went a distance of forty or fifty feet east of the easterly end of the crossover before it was stopped.

While, under other circumstances, a rate of speed of three or four miles an hour could not fairly be regarded as evidence of carelessness, yet, with the situation presented here and with all these facts before the referee, we cannot say that his conclusion that the Schenectady Railway Company was negligent is unsupported by the evidence.

On the trial the Schenectady Railway Company rested its case on its exception to a denial of its motion for a nonsuit at the close of the plaintiff's proof and announced that no evidence would be introduced on its behalf. This position was adhered to, except that its counsel asked a few questions upon cross-examination of the witnesses produced on behalf of the other defendant, the answers to which did not materially change the situation so far as the plaintiff's case against it was concerned. It insists that any testimony beneficial to the plaintiff's case brought out upon the examination of the traction company's witnesses cannot prevent it from having the full benefit of its exception to the denial of its motion for a nonsuit. It is not necessary to decide as to this contention, as the conclusion we have expressed as to the correctness of the decision of the referee as to the negligence of the Schenectady Railway Company is based entirely upon the plaintiff's proofs without any reference to that produced by the traction company in its defense.

We also think that the judgment against the traction company is amply sustained by the evidence under the rules of law applicable as against it. The negligence charged against it was that its tracks, switch and the appliances connected therewith were improper, dangerous, insufficient and defective. Notwithstanding the fact that the switch may have been misplaced by the jarring of the passage over it of the front trucks of the Schenectady Company's car, yet the accident was caused because the tongue of the switch did not stay where it was put by its own employees. It was bound under the traffic agreement to maintain and keep in repair the switch and the tracks. The only inference from the testimony is that the switch was operated by its own employees. It was bound to the highest degree of care in this respect. It was using its tracks and switch in a way they were not intended to be used, in order to facilitate the repairs

to its tracks. In so using the switch, if the tongue would not remain in place without some mechanical means for holding it there, it was its duty to provide such means. When the plaintiff proved that the accident happened in the way it did, the presumption was that the traction company was negligent, and it was not incumbent upon the plaintiff to show the cause for the switch being misplaced. Yet, notwithstanding that it had employees in the vicinity of the accident, it did not call a single witness who saw the accident.

We think, therefore, that the conclusion of the referee that both the defendants were negligent has sufficient support in the testimony.

The judgment as against both defendants should be affirmed, with costs.

All concurred, except HOUGHTON, J., dissenting from affirmance of judgment against the defendant Schenectady Railway Company.

Judgment affirmed, with costs.

LOUIS LE DUC, as Administrator, etc., of LOUIS A. LE DUC, Late of the City of Cohoes, N. Y., Deceased, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Negligence — footpath across the tracks of a railroad — when it is not of such a kind as to require active vigilance to protect one using it.

In an action brought to recover damages resulting from the death of the plaintiff's intestate, a boy ten years of age and *sui juris*, who, while crossing the defendant's railroad track, which was constructed upon its right of way, was struck and killed by a locomotive, the plaintiff contended that the intestate was killed while crossing upon a path or traveled way across the railroad tracks which the defendant had permitted the employees of a neighboring soap factory and others to use for many years. The alleged path led from an open field on the west side of the right of way to the yard of the soap factory on the east side of the right of way. At the western end of the alleged path an opening two feet wide had been left in the railroad fence. At the eastern end of the alleged path the railroad fence was down. All persons attempting to use the alleged path from either direction were obliged to trespass on private property in order to get to it.

Held, that the pathway was not such a one as imposed upon the defendant the duty of exercising active vigilance to protect persons using the same from injury.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Albany on the 15th day of January, 1903, upon the verdict of a jury for \$3,000, and also from an order entered in said clerk's office on the 23d day of January, 1903, denying the defendant's motion for a new trial made upon the minutes.

William P. Rudd, for the appellant.

Mark Cohn, for the respondent.

CHESTER, J. :

The plaintiff's intestate, a boy over ten years of age, was struck by a locomotive drawing a passenger train running southerly on the defendant's single-track railroad in the southerly outskirts of the city of Cohoes, while he was crossing such track, and was killed. The plaintiff has received a verdict for the resulting damages to the next of kin, and from the judgment entered thereon the defendant has appealed.

The contention of the plaintiff is that the place where the deceased was crossing was a path or traveled way across the railway track, which the defendant had permitted the public to use for many years for their convenience in crossing at that point. While it is in the limits of the city it is in the outskirts thereof and it is sparsely settled thereabouts, especially on the westerly side of the track, where it is open country composed of farm lands. Between the defendant's depot in Cohoes and the southerly boundary of the city there is no street crossing the defendant's track except Columbia street and that is not a grade crossing. The track between these points is entirely upon the defendant's right of way. The train was running at a speed of twenty to twenty-five miles an hour. On the east side of the defendant's right of way, at the point in question, there is located a soap factory. On the west side of the right of way, somewhat southerly from the soap factory, is a frog pond, where the plaintiff's intestate and some of his young companions had been playing on the afternoon of the accident. The alleged pathway was one commencing in the west line of the defendant's right of way at the top of an embankment a considerable distance northerly of the north end of the soap works, and at a point over

400 feet northerly from the place where the plaintiff alleges in his complaint the accident happened, and then leading down the embankment to and across the track to the easterly side thereof, then along that side of the track southerly to the southerly end of a railroad platform at the soap works, then down a steep incline to the southerly end of a building or barn south of the soap works, and then across the yard of the soap works property to a public street.

In order to show that the defendant had assented to the use of this path by those desiring to cross, it was shown that on the west-erly side of the track at the point where the path enters the defend-ant's right of way there had been left an opening in the railroad fence about two feet wide, with a post upon each side, to which the defendant's wire fence on each side was attached. There was also evidence that the wire fence on the easterly side of the defendant's right of way at the southerly end of the building or barn had been allowed to be down for some time, so that access to the track was not prevented by the fence at that point, and that for a considerable period employees at the soap factory and others had gone on the defendant's right of way at these places and crossed its track there. From this it is argued that the defendant had acquiesced in the public use of this place as a crossing to such an extent as amounted to a license for such use and which imposed a duty upon the com-pany as to all persons so crossing, to use reasonable care in the run-ning of its trains so as to protect persons so crossing from injury, under the doctrine laid down in the case of *Swift v. Staten Island R. T. R. R. Co.* (123 N. Y. 645) and kindred cases. But to hold that doctrine with respect to the facts proven in this case would put the burden upon every railway company to give some warning of the approach of its trains at every point upon its right of way wherever people were accustomed to cross it whether as licensees or trespassers.

I do not think the doctrine can be extended to apply to the facts proven in this case. Here there is no alley, public place or right of way leading up to the defendant's right of way at either of the places where it is shown that people entered thereon for the purpose of crossing, as has been the case in many, if not most, of the cases where the doctrine contended for has been applied. The opening in the fence on the west side of the right of way led to an open field or pasture lot. The place where the fence

was down on the east side of the right of way led to the yard of the soap factory property. All persons crossing the track at the place in question were obliged to trespass on private property to get on the right of way and also to get off in whichever direction they were proceeding.

The cases, too, where the doctrine has been applied were where the crossing had been used extensively, notoriously and with the knowledge of the defendant. Whatever may be said of the use of the opening in the fence on the west side of the track, which was evidently left for the convenience of those going to the soap factory, and of the use of the path leading from such opening across the track to the factory, the proof certainly does not show an extensive or notorious use by those entering the right of way on the easterly side through the yard of the soap factory. The proprietor of the factory, who must be presumed to have as much knowledge of the situation as any one, testified that there has been no path leading from his lot up to the railroad track since 1888, and upon the plaintiff's photograph of that place a path is not perceptible except it may be to the eye of an expert.

It was here where the plaintiff's intestate entered upon the right of way to return to the frog pond to resume his play with his companions after a short absence, when in crossing the track he was killed. The path, if there is one, at that point does not lead to the frog pond but up along the rear of the buildings upon the factory property to a point near the southwesterly corner of the railway platform at the factory. If there is any fact indisputably proven in this case, it is that the plaintiff's intestate was not crossing the defendant's track upon this alleged path at the time he was killed, but he was a very considerable distance southerly therefrom, going towards the frog pond and not towards the opening in the fence on the westerly side of the track where the path is claimed to lead. For this reason, even if it be conceded that the defendant owed him a duty, had he been upon the path, he was clearly a trespasser where he was, and the defendant owed him no duty of active vigilance, and would only be liable in case of willful or intentional misconduct resulting in his injury. No evidence justifying a verdict on that theory was given, nor was the cause of action based or tried upon that theory.

The evidence showed also that the plaintiff's intestate was guilty of contributory negligence. He was a boy of ten years of age, as bright as the average boy of that age, with fair hearing and good eyesight. No claim is made that he was not *sui juris*. There was a spur or side track leading northerly on the east side of the main track from a switch about 140 feet south of the southerly end of the railroad platform at the factory to such platform, and there was evidence that a box car was standing upon this spur at the time of the accident. Notwithstanding this, the plaintiff testified that from the point where he said he saw his boy look both ways just before he proceeded to cross the tracks he could see about 500 feet to the north. An engineering student called by the plaintiff testified that from the position where the plaintiff said the boy was, which was about 25 feet south of the platform of the soap works, and allowing that the boy's height was from three feet five to three feet six inches, he could see up the track 280 feet with the car there on the spur. On the other hand, an engineer sworn for the defendant testified that, standing upon the bank 10 or 12 feet east of the east rail opposite the frog pond, and at the place where it was alleged in the complaint the deceased was crossing the track when he was killed, the track can be seen for a distance of 775 feet northerly, and that a box car standing at the platform of the factory would not at all obstruct the view northerly up the track from that point.

So that even upon the plaintiff's testimony alone, which, in view of the testimony of the defendant's engineer, is as favorable to the plaintiff's case as it could well be made, the boy had an unobstructed view of the track in the direction from which the train was coming for a sufficient distance to have avoided it if he had given any heed to the situation or had used the faculties which he had. He was familiar with the locality. He was on foot and could easily have stopped. It was daylight. If he did not see the train before he reached the track it was by reason of his negligence. If he did see it, his going on without stopping was an act of gross carelessness. Notwithstanding the evidence that the boy "looked," it is clear, in view of the other facts, that there was a failure on the part of the plaintiff to establish that his intestate was free from contributory negligence. (*McAuliffe v. N. Y. C. & H. R. R. R. Co.*, 88 App. Div. 356.)

Upon the whole case the verdict was clearly against the evidence, and the defendant's motion to set aside the verdict for that reason should have been granted. There having been an exception to that denial, the defendant is entitled to a reversal.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

MARTIN LOCKWOOD, Respondent, v. TROY CITY RAILWAY COMPANY,
Appellant.

Negligence — injury to a driver thrown out of a wagon which collided with a street car on a narrow bridge — charge as to the care required of the railroad company — a disease must necessarily and directly be caused by the injury.

A complaint in an action to recover damages for personal injuries alleged: "Said plaintiff was knocked and thrown from his wagon to the ground and floor of said bridge, and thereby severely injuring the said plaintiff, breaking his ribs, spraining his ankle and injuring his back and right hip, and thereby made him sick, sore, lame and disabled for a long time, and prevented him from attending to his business, causing him to suffer great pain of body and mind, and caused him permanent injury and disability and exposed him to still greater and further injury, and he has been and will be put to great trouble and expense in doctoring and trying to be cured of his said injuries."

Held, that proof that the plaintiff was suffering from kidney disease as a result of the accident was not admissible under the pleadings, it not appearing that such disease was necessarily and directly caused by the injuries to the plaintiff's back.

In an action brought to recover damages for personal injuries, sustained by the plaintiff in consequence of a collision between the plaintiff's wagon and one of the defendant's street cars, it appeared that the collision occurred upon a bridge which was so narrow that there was only a small margin of space outside the defendant's tracks in which the plaintiff's wagon could pass the defendant's car.

At the conclusion of the principal charge the following colloquy took place between the defendant's counsel and the court: "In view of the statement of the plaintiff's counsel to the jury in the summing up, that the defendant was bound to exercise an extraordinary degree of care in operating this car upon the bridge, I ask you to charge the jury that when the defendant's motorman was on the bridge in the operation of the car, the only duty and obligation resting upon him to avoid injury to the plaintiff was the exercise of the reason-

able care which a reasonably prudent man would exercise under the circumstances. The Court: Well, yes, but it should be greater than it would be in a safer place. The narrowness of the passage placed a duty upon the motorman to exercise greater care and caution than he would if the passageway had been wider. Mr. Roche: I except to the charge and to the modification. I ask you, however, to say that while the duty and obligation must be proportioned to the surrounding circumstances, the defendant's motorman was not bound to exercise an extraordinary degree of care in the operation of the car. The Court: I decline so to charge." Defendant excepted.

Held, that the denial of the request to charge that the defendant's motorman was not bound to use an extraordinary degree of care was erroneous;

That notwithstanding the court said, "Well, yes," to the request as first made, the modification of the request was followed so closely by the denial of the request to charge that the motorman was not bound to exercise an extraordinary degree of care that the jury might have believed that it was the duty of the motorman to exercise extraordinary care;

That the defendant was entitled to a charge that the motorman was not bound to exercise an extraordinary degree of care, but ordinary care only, under the circumstances which confronted him.

APPEAL by the defendant, the Troy City Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Rensselaer on the 28th day of March, 1903, upon the verdict of a jury for \$800, also from an order entered in said clerk's office on the 28th day of March, 1903, denying the defendant's motion for a new trial made upon the minutes, and also from an order entered in said clerk's office on the 18th day of April, 1903, granting the plaintiff an extra allowance of costs.

William J. Roche, for the appellant.

J. K. Long, for the respondent.

CHESTER, J.:

The action is for personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendant in operating one of its electric cars on a bridge over the Mohawk river at Ontario street in the city of Cohoes. The plaintiff has procured a judgment, and the defendant appeals.

With reference to the injuries sued for it is alleged in the complaint as follows: "Said plaintiff was knocked and thrown from his

wagon to the ground and floor of said bridge, and thereby severely injuring the said plaintiff, breaking his ribs, spraining his ankle and injuring his back and right hip, and thereby made him sick, sore, lame and disabled for a long time, and prevented him from attending to his business, causing him to suffer great pain of body and mind, and caused him permanent injury and disability and exposed him to still greater and further injury, and he has been and will be put to great trouble and expense in doctoring and trying to be cured of his said injuries."

Upon the trial the plaintiff was allowed to prove, over the defendant's objection and exception, that the plaintiff had kidney disease and that his physician had treated him therefor, and he sought to show, over a like objection and exception, that this disease resulted from the plaintiff's injuries. One of the objections to the testimony was that it was not within the pleadings, and that the defendant was not, therefore, apprised of plaintiff's claim for injury for that reason. This was a valid objection and should have been sustained. Kidney disease was not in any wise specified in the complaint among the injuries alleged to have been received by the plaintiff. While one of the plaintiff's physicians testified that trouble with the kidneys or kidney disease might possibly result or arise from injuries to the back, the proof does not show that such disease was necessarily and directly caused by the injuries to plaintiff's back, and, therefore, if caused by the accident, it constituted special damages which should have been specifically alleged by the plaintiff if he sought to recover damages therefor, and he not having so alleged it, it was error to receive the evidence. (*Kleiner v. Third Avenue R. R. Co.*, 162 N. Y. 193; *Gumb v. Twenty-third St. R. Co.*, 114 id. 411.)

The case is unlike that of *Ehrgott v. Mayor* (96 N. Y. 277), cited by the plaintiff. There the allegation was that the plaintiff had suffered "great bodily injury; that he became, and still continues to be sick, sore and disabled * * * and that he was otherwise injured," and the court held that these allegations were sufficient to authorize proof of any bodily injury resulting from the accident, and that if the defendant desired that they be more definite it could have moved to have them made more specific, or for a bill of particulars.

The judgment will have to be reversed for another reason. The

bridge in question, where the accident happened, was an unusually narrow one and left only a small margin of space upon the south side of the track, where plaintiff was driving, for his wagon to pass the defendant's car which was approaching from the other direction. In so passing his horse became fractious and there was a collision between the car and his wagon, throwing him to the floor of the bridge and injuring him. After the conclusion of the principal charge of the court to the jury the defendant's counsel, Mr. Roche, said: "In view of the statement of the plaintiff's counsel to the jury in the summing up, that the defendant was bound to exercise an extraordinary degree of care in operating this car upon this bridge, I ask you to charge the jury that when the defendant's motorman was on the bridge in the operation of the car, the only duty and obligation resting upon him to avoid injury to the plaintiff was the exercise of the reasonable care which a reasonably prudent man would exercise under the circumstances. The Court: Well, yes, but it should be greater than it would be in a safer place. The narrowness of the passage placed a duty upon the motorman to exercise greater care and caution than he would if the passageway had been wider. Mr. Roche: I except to the charge and to the modification. I ask you, however, to say that while the duty and obligation must be proportioned to the surrounding circumstances, the defendant's motorman was not bound to exercise an extraordinary degree of care in the operation of the car. The Court: I decline so to charge." Defendant excepted.

Notwithstanding the court said, "Well, yes," to the request as first made, the modification of the request followed so closely by its denial of the request to charge that the motorman was not bound to exercise extraordinary care, may well have left the jury where they believed that the court viewed the situation as one requiring just that degree of care on the part of the motorman.

While the court was right in saying that the motorman was required to exercise greater care and caution than he would if the passage had been wider, yet, in view of the fact stated in the request, as to the statement of plaintiff's counsel in his summing up to the jury, where he wrongly stated the law to them, the defendant was entitled to have that remedied by a clear and correct statement of the law in that respect, and under the circumstances it was entitled

to the specific charge contained in the request, that the defendant's motorman was not bound to exercise an extraordinary degree of care in the operation of the car, as that stated the law correctly. The degree of care which the motorman was bound to exercise was ordinary care, only, under the circumstances which confronted him and not an extraordinary degree of care. This principle is elementary and does not require the citation of authority in support thereof, and the failure of the court to make this plain to the jury and the refusal to charge the defendant's request in this respect requires a new trial.

The cases brought by passengers on railways, where the doctrine of extraordinary care has been applied, have no application to the case presented here.

Many other alleged errors upon the trial are urged by the appellant in support of its appeal, but we think it unnecessary to consider them, as under the light of the discussion which has been had concerning them upon this appeal the same situation may not be presented upon another trial.

For the errors pointed out the judgment and orders appealed from must be reversed, with costs to the appellant to abide the event, and a new trial granted.

All concurred.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK REALTY CORPORATION, Respondent, v. NATHAN L. MILLER, as Comptroller of the State of New York, Appellant.

Certiorari to review the refusal of the State Comptroller to revise a franchise tax — the Comptroller should not be required to state the grounds of his refusal — motion to amend the writ — failure of the Comptroller to appear on the motion for the writ.

Section 198 of the Tax Law (Laws of 1896, chap. 908), relative to certiorari proceedings to review the action of the State Comptroller in refusing to revise and readjust a franchise tax imposed upon a corporation, nowhere authorizes or requires the Comptroller to return, in obedience to the writ, the grounds of his

refusal. If the writ contains such a provision it may be stricken out on motion as unauthorized.

Where the petition for the writ includes a prayer that the Comptroller be directed to return the grounds of his refusal, the Comptroller, by neglecting to appear upon the return day of the motion for the writ, does not, if such a provision is inserted in the writ, waive his right to move to strike it out; but the court should, before hearing him upon the motion, first require him to excuse his default.

APPEAL by the defendant, Nathan L. Miller, as Comptroller of the State of New York, from an order of the Supreme Court, made at the Albany Special Term and entered in the office of the clerk of the county of Albany on the 28th day of September, 1903, denying the defendant's motion to amend a writ of certiorari theretofore granted herein.

Edward F. Clark, for the respondent.

John Cunneen, Attorney-General, and *William H. Wood*, for the appellant.

CHESTER, J. :

The order appealed from was made in a proceeding to review a determination of the Comptroller in refusing to revise and readjust a franchise tax imposed upon the relator. By it the appellant's motion to amend the writ of certiorari granted herein by striking from the command thereof the words "and the grounds for your refusal to revise and readjust the same in the manner and as requested by said New York Realty Corporation," was denied. The motion for the writ was made upon notice to the Comptroller, who failed to appear upon the return day of the notice. The prayer for relief contained in the petition included a prayer that the Comptroller be directed to return the ground of his refusal to revise and readjust the tax, and that requirement was included in the writ as issued.

The Tax Law provides, with respect to the review of the determination of the Comptroller by certiorari, that "for the purpose of such review the Comptroller shall return on such certiorari the accounts and all the evidence before him on such application and all the papers and proofs upon the original statement of such account and all proceedings thereon." (Laws of 1896, chap. 908,

§ 196.) The statute nowhere authorizes or requires the Comptroller to return the *grounds* of his refusal to revise or readjust the account for taxes. This court held, under section 252 of the Tax Law, in a case where a writ of certiorari commanded more than the statute required to be returned, that such command should be stricken out upon motion, as being unauthorized. (*People ex rel. Buffalo Gas Co. v. Commissioners*, 55 App. Div. 186.) So it was held by the old General Term in the first department that a board of assessors could not be required to return the *methods* by which they have arrived at a conclusion in determining the amount of damages sustained by property owners by reason of a change of grade pursuant to chapter 729 of the Laws of 1872. (*People ex rel. Heiser v. Gilon*, 51 N. Y. St. Repr. 825.)

The same principle applies here, for this writ clearly requires the Comptroller to return more than the law, under which the proceedings to review were instituted, authorizes or requires him to return and to that extent is unlawful.

The relator insists, however, that because the Comptroller did not appear upon the return day of the motion for the writ he has waived the right to move to amend it. It is true that the ordinary rule is that where a party makes a default in appearing the court may grant the relief prayed for. Indeed rule 37 of the General Rules of Practice expressly so provides with respect to motions. But the same rule also provides that, upon default, the relief asked for may be granted "unless the court shall otherwise direct." The court, therefore, was not bound, in such a case, to grant the relief simply because it was asked for. Where a moving party in his papers asks the court to grant unlawful relief, it would not, even on default, grant such relief, if it had any knowledge or intimation that it was unlawful, but it would "otherwise direct" and would confine itself to the exercise of lawful power. It was fairly incumbent upon the appellant in this case when he received the relator's notice of motion to advise the court that the moving party was asking for more than it was lawfully entitled to and thus save the court from being led by the other side into granting unlawful relief. The appellant not having done so, and not having made any attempt whatever to excuse his default, we think the court was justified for these reasons in denying his motion to amend the writ. We think,

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however, that by simply failing to appear he did not *wave* his right to move to amend by striking out from the writ the provision which the relator ought not to have asked the court to insert, but the appellant by his default having practically permitted, or at least not prevented, the insertion of such a provision, if the court is to enforce observance of the usual and orderly methods of practice, it should first require him to excuse his default before hearing him upon his motion to strike out.

The order appealed from should be affirmed, with ten dollars costs and disbursements, with leave to the appellant to renew his motion to the Special Term on excusing his default.

All concurred.

Order affirmed, with ten dollars costs and disbursements, with leave to the appellant to renew his motion at Special Term on excusing his default.

In the Matter of the Application of JOHN GILES FORD, Appellant,
for a Peremptory Writ of Mandamus against THE BOARD OF
SUPERVISORS OF DELAWARE COUNTY, Respondent.

Publication of election notices — effect of more than one paper being designated by the board of supervisors — in fixing the compensation therefor, the supervisors are not limited by the prices fixed by section 21 of the County Law.

Under section 23 of the County Law (Laws of 1892, chap. 686) the board of supervisors of a county are authorized to direct the publication of the election notices in but two newspapers, one representing each of the two principal political parties.

An attempt by the members of the board of supervisors to designate for this purpose four papers for each of the two principal political parties is not valid as to the paper first mentioned in each of the respective lists, but is void as to all of the papers so designated, and no resolution revoking the designation is necessary. Section 21 of the County Law, relative to the publication of the Session Laws, provides: "The expense of such publication * * * in counties not having a city of over fifty thousand inhabitants shall not be less than twenty nor more than fifty cents per folio, and in other counties not less than thirty nor more than fifty cents per folio; the specific rate in either case to be fixed by the board of supervisors."

Section 22, relating to the publication of election notices, provides: "Such boards, except in the counties of Erie and Kings, shall, in like manner, desig-

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nate two newspapers, representing respectively each of the two principal political parties into which the electors of the county are divided, in which shall be published the election notices issued by the Secretary of State, and the official canvass, and fix the compensation therefor, which shall be a county charge."

Held, that the phrase, "in like manner," contained in section 23, only relates to the designation of the newspapers in which the election notices shall be published, and not to the fixing of the compensation for the publication of such notices;

That the board of supervisors, in fixing the compensation for the publication, is not limited by the rates fixed by section 21 for publishing the Session Laws.

APPEAL by the petitioner, John Giles Ford, from an order of the Supreme Court, made at the Broome Special Term and entered in the office of the clerk of the county of Delaware on the 21st day of December, 1903, denying the petitioner's application for a peremptory writ of mandamus.

The relator is the proprietor of a Republican newspaper published in the county of Delaware known as the *Stamford Recorder*.

During the annual session of the board of supervisors of that county held in November, 1902, the Republican members of that board signed and filed with its clerk a written designation of four Republican papers, in which designation the relator's paper was first named, to publish the election notices for the ensuing year. A similar designation of four Democratic papers was made and filed by the Democratic members of the board for the same purpose.

Upon discovery, in July, 1903, that the election notices would be of unusual length and if published in eight papers at the old rate would involve an expense of upwards of \$20,000, a special meeting of the board of supervisors was called and convened on the twentieth of that month, and on the next day, after being advised by the district attorney of the county that the designation of four papers for each party to publish the election notices was an illegal designation, resolutions were unanimously passed by the board revoking and rescinding the designation theretofore made, directing the members of the board representing each of the two principal parties to each designate one paper to publish the election notices and fixing the compensation for the papers so to be designated at ten cents a folio for the first 300 folios and five cents a folio for all folios in excess of that number, for the publication of such notices.

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When the relator became aware of the fact that it was claimed that the designation of his paper, with the three other papers, was invalid, he on the 20th day of July, 1903, filed with the clerk of the board a written acceptance of such designation.

After the adoption of such resolutions the members of the two political parties proceeded to make designations, and all the Republican members on July 21, 1903, signed a written designation of the *Stamford Recorder* to publish the election notices in the county of Delaware for the year 1903.

The relator wrote below such designation the following: "The above designation is hereby accepted at the compensation fixed by the Board July 21st, 1903. J. Giles Ford."

The designation and acceptance were filed with the clerk, and the relator published the election notices for the year 1903 in his paper the required length of time.

At the annual session of the board in November, 1903, the relator presented his bill for such publication, 341 folios at the rate of fifty cents per folio, amounting for fourteen weeks to \$2,387, for audit.

The bill was audited by the board at 332 folios at the rate fixed by it and allowed at \$442.40.

The difference in the number of folios arises from the board treating the matter published as one notice and not as separate notices in which fractional parts of a folio had been charged as for a full folio. There is no claim that the matter published contained in fact more than 332 folios.

Prior to 1903 the rate paid by the board had been fifty cents per folio pursuant to a resolution passed in 1900 fixing that rate.

From an order denying the relator's application for a peremptory writ of mandamus to compel the board to audit and allow his claim at the rate of fifty cents per folio according to the items thereof, he appeals.

Charles L. Pashley, for the appellant.

George A. Fisher, for the respondent.

CHESTER, J. :

The contention of the relator, briefly stated, is that his paper having been the first of the four named in the designation of November,

1902, such designation as to his paper was a valid one which could not thereafter be withdrawn or rescinded; that the Republican members had no power thereafter to make another designation; that the rate of compensation fixed by the resolution of July 21, 1903, was illegal because below the minimum fixed by law; that the acceptance of the designation on July 21, 1903, was signed by him while under duress and that by such acceptance he did not waive his right to publish the election notices under the prior designation and to be paid therefor at the previously existing rate of fifty cents per folio.

The County Law, which was in force at the time, authorized the designation of *two* newspapers only, one representing each of the two principal political parties, in which to publish election notices. (Laws of 1892, chap. 686, § 22.) The attempted designation of four papers representing each of the two parties was clearly void as to all the papers so designated, unless the circumstance that the relator's paper was named first in enumerating the four makes the designation valid as to it.

Two cases are cited by the relator in support of his contention in this respect. The first is *People v. Supervisors of Richmond Co.* (20 N. Y. 252). There two persons had been appointed to fill vacancies in the office of commissioners of highways. Three had been elected and classified. The commissioners of the first and third class omitted to qualify and two were appointed to fill the vacancies without any designation of the class to which they respectively belonged. JOHNSON, Ch. J., who wrote the opinion of the court, says: "It seems to me a natural construction to place upon such an appointment to regard the first-named appointee as appointed to the first class, and that construction I am, in the absence of any authority upon the subject, inclined to adopt, rather than come to the conclusion that no effectual appointment was made." The only determination made upon that branch of the case was as to the classification of the two commissioners where the appointment of *both* was authorized, and such determination was based upon the construction which the court, in the absence of authority, deemed it essential to put upon an appointment so made.

The other case cited is *People ex rel. Banta v. Kneissel* (58 How. Pr. 404). There the mayor of New York nominated to the board

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of aldermen for confirmation four persons as inspectors of weights and measures, when there were only two such officers in the city, one for the first and the other for the second district. The board of aldermen acted upon the nominations separately, and the court held that the relator, who was the one first confirmed, was lawfully appointed, although in the opinion it was stated that "regularly and properly one person only should have been nominated for each of these offices."

These cases undoubtedly were properly decided upon the facts presented, but they should not be regarded as authorities to be extended beyond the questions there presented for decision.

Here there was an effort to deal out "patronage" to four papers instead of to one. This was attempted to be done by a single designation naming all four. There was but one transaction. The whole scheme was void as being unauthorized by law. The fact that the relator's paper happened to be first named in such a scheme cannot fairly be regarded as making a legal designation of his paper when all the rest of the attempt was concededly unlawful and void. Section 19 of the County Law (Laws of 1892, chap. 686, as amended by Laws of 1900, chap. 400) authorizes the designation of certain newspapers to publish the Session Laws and Concurrent Resolutions of the Legislature required by law to be published, fixes the method of making such designation, and provides that "any designation of a paper or papers made contrary to the provisions of this section shall be void." Section 22 of the County Law provides for the designation "in like manner" of *two* newspapers for the publication of election notices. The language quoted from section 19 which by section 22 is thus made applicable to the method of designating papers to publish election notices is broad enough to cover and to prohibit a designation of papers in excess of the number authorized by law as well as to prevent a departure from the methods authorized by law for the designation, and the designation as a whole, including that of the relator's paper, was one which came under the express condemnation of the statute and was, therefore, unlawful. Such an attempt by members of the board could in no way bind the county nor confer any rights upon the relator.

The designation of November, 1902, having been unlawful, it was

as if no designation had been made and there was no need of the passage by the board of the resolution revoking and rescinding it. Without such resolution nothing stood in the way of a legal designation at the first opportunity.

The board was charged, I think, under the law, with the duty of fixing the compensation for publishing these notices. Section 19 of the County Law (as amd. *supra*) provides for the designation of newspapers for the publication of the Session Laws and for the manner of such designation. Section 21 provides that "the expense of such publication * * * in counties not having a city of over fifty thousand inhabitants shall not be less than twenty nor more than fifty cents per folio, and in other counties not less than thirty nor more than fifty cents per folio; the specific rate in either case to be fixed by the board of supervisors." Then follows section 22 relating to election notices and official canvass which is as follows: "Such boards, except in the counties of Erie and Kings, shall, in like manner, designate two newspapers, representing respectively each of the two principal political parties into which the electors of the county are divided, in which shall be published the election notices issued by the Secretary of State, and the official canvass, and fix the compensation therefor, which shall be a county charge."

The argument in behalf of the relator is that the phrase "in like manner" in section 22 refers not only to the method of designation, but to fixing the compensation, and, therefore, that the board in fixing the compensation was limited by the rates fixed by section 21 for publishing the Session Laws. To uphold that theory requires a somewhat forced and unnatural construction of the section. The language is that "such boards * * * shall, in like manner, designate two newspapers * * * in which shall be published the election notices * * * and fix the compensation therefor." It is not that it shall in like manner designate the newspapers and in like manner fix the compensation. I do not think we should give a forced or liberal construction to this section, the only effect of which in this case will be to add to the public burdens when the other construction seems the natural and reasonable one. But it is urged that such a construction will permit a board to fix a rate much above the maximum rate for publishing the Session Laws as well as one below

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the minimum rate for such publication and much abuse might result. We may trust to the electors to deal with a supervisor who would use his position to aid in fixing an unreasonably high rate or a rate above the usual or prevailing rate for such a service.

The view of the case so far expressed if correct leaves the question of the alleged duress of the relator in signing the acceptance of the last designation at the rate then fixed of little moment, yet it will be briefly referred to. It appears that the relator was present at the special session of the board in July and was told by several Republican members that as a condition of designating his paper he must sign a written acceptance thereof. He went before the board and protested against its action and stated what he claimed his rights to be under the alleged designation of the prior November. The written designation of his paper was then prepared and signed by all the Republican members. Before filing it he was informed that if he did not indorse his acceptance thereon the designation would be given to some other paper. He then wrote on the designation the words "The above designation is hereby accepted." That was not deemed sufficient, the chairman insisting that the words "at the compensation fixed by the Board July 21st, 1903," be added. These words were finally added and the acceptance signed by the relator. There was no duress or coercion about all this. The relator was over twenty-one years of age, possessed of all his faculties, under no restraint whatever and was engaged in making the best bargain for himself that he could. His conduct simply showed that if he could not procure the designation at the old fifty cent rate he was willing to accept it at the rate fixed by the board, and that if he had any rights under the prior unlawful designation he waived them by accepting the new designation upon the terms fixed by the board.

Upon all the facts of the case the Special Term was fully justified in exercising its discretion against granting the writ asked for by the relator.

The order should be affirmed, with ten dollars costs and disbursements.

Order unanimously affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator, v. THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NEW YORK and Others, the Members Thereof, and ROCHESTER, SYRACUSE AND EASTERN RAILROAD COMPANY, Respondents.

Railroad Commissioners—certificate of "convenience and a necessity"—power of the board to authorize a change of route from that specified in the articles of incorporation.

On an application by a railroad company to the Board of Railroad Commissioners for a certificate under section 59 of the Railroad Law (Laws of 1890, chap. 565, as amd.) that "public convenience and a necessity require the construction of said railroad as proposed in said articles of association," the board is confined to the approval or disapproval, in whole or in part, of the route specified in the articles of incorporation.

The board has no power to grant a certificate, that public convenience and necessity require the construction of the railroad "as proposed in the articles of association of said company, provided that said railroad shall be built upon private right of way and not in the highway, except through cities, villages and hamlets on its route."

Quære, whether the certificate may be granted as to any other route than the one proposed in the articles of association—except as it may limit the certificate to a part only of such route.

CHESTER and HOUGHTON, JJ., dissented.

CERTIORARI issued out of the Supreme Court and allowed on the 19th day of November, 1902, directed to The Board of Railroad Commissioners of the State of New York and others, the members thereof, commanding them to certify and return to the office of the clerk of the county of Albany all and singular their proceedings had in granting to the Rochester, Syracuse and Eastern Railroad Company a certificate of public necessity to construct a railroad to be operated by electricity between the cities of Rochester and Syracuse.

The route of the Rochester, Syracuse and Eastern Railroad Company is from Rochester to Syracuse, paralleling to an extent the road of the relator. It runs through the various villages along the route, in some cases running a considerable distance from the relator's road. The certificate given recites that "the Board of Railroad Commissioners hereby certifies that public convenience and a neces-

sity require the construction of the railroad of the Rochester, Syracuse and Eastern Railroad Company as proposed in the articles of association of said company, provided that said railroad shall be built upon private right of way and not in the highway, except through cities, villages and hamlets on its route." The validity and propriety of this certificate is sought to be here raised by this writ of certiorari.

Albert H. Harris, for the relator.

William Nottingham, for the respondent railroad company.

SMITH, J.:

By section 2 of the Railroad Law (Laws of 1890, chap. 565, as amd. by Laws of 1892, chap. 676) the certificate of incorporation of the applicant road was required to state "the names and description of the streets, avenues and highways in which the road is to be constructed." By section 59 of that law (added by Laws of 1892, chap. 676, and amd. by Laws of 1895, chap. 545) it is provided that no railroad corporation shall exercise the powers conferred by law upon such corporations or begin the construction of its road "until the directors shall cause a copy of the articles of association to be published in one or more newspapers in each county in which the road is proposed to be located, at least once a week for three successive weeks, and shall file satisfactory proof thereof with the Board of Railroad Commissioners, nor until the Board of Railroad Commissioners shall certify that the foregoing conditions have been complied with, and also that public convenience and a necessity require the construction of said railroad as proposed in said articles of association. The foregoing certificate shall be applied for within six months after the completion of the three weeks' publication hereinbefore provided for."

By section 59a (added by Laws of 1898, chap. 643, and amd. by Laws of 1902, chap. 226) it is provided that upon such an application, where "it shall appear to the Board of Railroad Commissioners, after examination of the proposed route of the applicant company, that public convenience and a necessity do not require the construction of said railroad as proposed in its articles of association, but do require the construction of a part of the said railroad, the Board of

Railroad Commissioners may issue its certificate for the construction of such part of the said railroad as seems to it to be required by public convenience and a necessity."

In *People ex rel. Steward v. Railroad Commissioners* (160 N. Y. 202) it is held: "A determination by the railroad commissioners that a certificate of public convenience and necessity shall issue is a final determination of the rights of the owners of land through which the railroad will pass if constructed as to the question of public convenience and necessity." At page 211, PARKER, Ch. J., in writing for the court, says: "The machinery provided by the statute requires the publication of the articles of association in each county through which the proposed railroad is to pass, so that every owner of lands to be affected, as well as the public generally, may have notice of the fact that a tribunal created by the State for that purpose, among others, is about to determine as against them whether public convenience and a necessity require the construction of the proposed railroad."

The commissioners have not changed the proposed route, locating the same definitely in some other place, but have in effect said to the corporation that it might locate its route wheresoever it would, so long only as it kept without the highway and conformed to the route proposed within the cities, villages and hamlets.

If this certificate be within the power of the commissioners to grant, it is difficult to see why they might not authorize the construction of the road between Rochester and Syracuse, leaving to the corporation itself the right to select its route between those cities. The difference is in degree and not in principle. To the commissioners is left by the law the determination of the public necessity and convenience of the route proposed in the articles of association. Under the certificate as given the route which they shall select between the hamlets, villages and cities has not been approved by the Board of Railroad Commissioners. The corporation is left free to choose that part of its route without their approval. This, we think, is opposed both to the spirit and the letter of the law. The necessity or convenience of these interurban roads depends largely upon the route taken between the villages, hamlets and cities. In the case at bar the necessities of travel from village to village, or village to city or city to city, are fairly well met by the roads already

in existence. It is important then that the Board of Railroad Commissioners shall have before them the specific route proposed by the applicant company and shall approve or disapprove of that route.

In *People ex rel. Depew R. Co. v. Commissioners* (4 App. Div. 259) Justice HERRICK, in writing for this court in reference to the act, said (at p. 263): "Under that the railroad commissioners have to pass upon the specific application of each company; they are to determine whether 'public convenience and necessity require the construction of said railroad, as proposed in said articles of association' of the petitioning company; that is something more than determining whether public necessity and convenience require the construction of a railroad between the points mentioned in the articles of association as the proposed termini of their road. It means something more than merely determining whether public convenience and necessity require the building of any road between the proposed termini; they must determine whether public convenience and necessity require the construction of the specific road proposed in the articles of association of the petitioning corporation."

In examining this question it is important to consider the effect of the holding in the case of *People ex rel. Steward v. Railroad Commissioners* (*supra*). The determination of the Board of Railroad Commissioners is a determination once and for all of the necessity of the proposed road. Landowners whose land the company would appropriate for the purposes of the road can no longer resist that appropriation on the ground that the location of the road upon their premises is unnecessary. In view of this holding it would seem to be of the utmost importance that by this publication each landowner should have notice that his land is sought to be taken to the end that he may contest before the Board of Railroad Commissioners the necessity of the road.

Also, in examining this question, the provisions of section 59a of the Railroad Law (as amd. *supra*) have, I think, some significance. It is therein provided that the Board of Railroad Commissioners may grant a modified certificate approving of a part only of the proposed road. If the maxim *expressio unius est exclusio alterius* be applied there would seem to be fairly indicated an intention to limit the right of the commissioners in the granting of their

certificate to a variation from the route proposed in the articles of association only to the extent of authorizing the granting of the certificate as to a part of the route. Against such a variation the reasons suggested against the granting of the certificate in the case at bar would be without force.

There are cases, in which the Board of Railroad Commissioners have conditioned their certificates, where the certificates have been upheld by the court, but in no case has a condition attached compelled a change of the route originally proposed.

The reading of the statute seems to require the granting of the certificate only as to the route proposed in the articles of association except in the single instance specified in section 59a. It is for the Legislature and not the court to grant to the commissioners more extended powers, and there is apparently substantial reason for denying to them the power which they have assumed here to exercise.

We are of the opinion, therefore, that the determination of the Board of Railroad Commissioners, as expressed in their certificate, should be reversed.

All concurred, except CHESTER, J., dissenting in memorandum in which HOUGHTON, J., concurred.

CHESTER, J. (dissenting):

I cannot agree that the determination of the Board of Railroad Commissioners in granting the certificate that public convenience and necessity require the construction of the railroad in question as proposed in its articles of association should be reversed because of the provision contained in the certificate that such railroad "shall be built upon private right of way and not in the highway, except through cities, villages and hamlets on its route." That I think is a condition to be commended.

While it is true that compliance with the provision will not result in building a road upon the *exact* route proposed in the articles of association, yet it will be upon substantially the same route. The line as proposed passes through certain hamlets, villages and cities, and it is required to be constructed on the route stated in the articles of association. It is only with respect to the country highways connecting the several villages and hamlets where any change

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in the route of the road is required. Notwithstanding such change the road must proceed from place to place in the exact order named in the articles of association and pass through the respective places upon the route there indicated.

Under section 13 of the Railroad Law (Laws of 1890, chap. 565, as amd. by Laws of 1897, chap. 235), after the certificate of public necessity has been granted, the company may change its route within the county named in its certificate of incorporation for the purpose of improving the line, and this may be done without the consent of the Board of Railroad Commissioners. With that power existing in the law the change from the route proposed in the articles of association in the present case is unsubstantial and could be effected by the respondent without application to the Board of Railroad Commissioners if that board had issued the certificate applied for without the provision or condition which it contained.

The relator had a right to insist that *no* certificate should issue for the proposed road, but I do not think it is aggrieved because of the slight change in the route between the villages and hamlets, required by the condition upon which the certificate was issued.

I think the determination should be confirmed.

HOUGHTON, J., concurred.

Determination annulled, with fifty dollars costs and disbursements against the respondent Rochester, Syracuse and Eastern Railroad Company.

In the Matter of the Application of PETER S. QUICK, a Judgment Debtor, Respondent, to Be Discharged from Imprisonment.

CHARLES E. FARRELL, JR., by CHARLES E. FARRELL, his Guardian ad Litem, Appellant.

Order to show cause shortening the time of notice of making an application to the court — it does not apply to the inauguration of a new action or proceeding, e. g., the discharge of an imprisoned debtor.

Section 780 of the Code of Civil Procedure, authorizing the court, upon the presentation of an affidavit showing grounds therefor, to permit a motion to be made, through the medium of an order to show cause, on less than the eight days' notice ordinarily required, only applies to matters already pending and

over which the court has acquired jurisdiction. The section does not apply to any of those steps which are required by statute to be taken in order to inaugurate a new action or proceeding.

Consequently where a person imprisoned under a body execution makes application to be discharged from imprisonment, pursuant to section 2205 of the Code of Civil Procedure, which requires that at least fourteen days before the petition is presented to the court the petitioner must serve upon the judgment creditor a copy of such petition and schedules "together with a written notice of the time when and place where they will be presented," the court has no power to dispense with the full fourteen days' notice, as the proceedings for the discharge of an imprisoned debtor are not commenced until the petition, schedules and affidavit, with due proof of service, as prescribed in section 2205 of the Code of Civil Procedure, are presented to the court.

APPEAL by Charles E. Farrell, Jr., by Charles E. Farrell, his guardian ad litem, from an order of the County Court of Saratoga County, entered in the office of the clerk of the county of Saratoga on the 14th day of September, 1903, discharging Peter S. Quick, a judgment debtor, from imprisonment.

On June 1, 1903, Peter S. Quick was arrested upon an execution against his person, for debt in the sum of \$2,221.55, at the suit of Charles E. Farrell, Jr., by his guardian *ad litem* Charles E. Farrell, and was imprisoned in the jail of Saratoga county. Upon September 4, 1903, he procured an order from the county judge of that county, in substance, requiring said Farrell, by his guardian, to show cause at a Special Term of the County Court of that county to be held at the court house in such county on the 14th day of September, 1903, at ten o'clock A. M., why an assignment of the property of said Quick should not be made and he be thereupon discharged from his said imprisonment pursuant to the provisions of the statute concerning the "Discharge of an imprisoned judgment debtor from imprisonment." (See Code Civ. Proc. chap. 17, tit. 1, art. 3.)

Such order was procured upon an affidavit of Quick, setting forth in substance that he was imprisoned, as above stated, that the next term of the County Court began on the 14th of September, 1903, and that he desired to present his petition for discharge at such term; that another term of said court would not be held until the first Monday in October; that he had no money to apply at a term of the Supreme Court, and that he would suffer greatly if he was compelled to wait and be longer deprived of his liberty. He, there-

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fore, asked for such order to show cause, and that a shorter notice than fourteen days be deemed sufficient.

The order so obtained, together with a copy of the petition for his discharge and the schedules annexed, were served upon the judgment creditor on September fourth, and on the fourteenth Quick was ordered before the County Court and presented thereto his petition and schedules and the affidavit required by section 2204 of the Code. The judgment creditor, Farrell, then appeared specially for the purpose of objecting that the fourteen days' notice required by statute had neither been given to nor served upon him or his attorney, and that the court had, therefore, no jurisdiction to proceed with the proceedings for discharge, and that the order to show cause was not warranted in these proceedings. The court overruled such objection and ordered that the matter proceed to a decision. The judgment creditor thereupon withdrew, and such proceedings were taken that Quick was ordered discharged from imprisonment. From such order of discharge this appeal is taken.

John L. Henning, for the appellant.

John Foley and *John A. T. Schwarte*, for the respondent.

PARKER, P. J. :

One of the provisions of the statute under which these proceedings were taken requires that at least fourteen days before the petition is presented to the court the petitioner must serve upon the judgment creditor a copy of such petition and schedules "together with a written notice of the time when and place where they will be presented." (See Code Civ. Proc. § 2205.)

It is conceded that such service was never made, and that without it, or some service equivalent to it, no order discharging the debtor could lawfully be made. The following cases are authority for the proposition that a service of the petition, schedules and notice as required in section 2205 of the Code is indispensable to invest the court with "jurisdiction of the particular case." (*Bulymore v. Cooper*, 46 N. Y. 236, 243; *Goodwin v. Griffiths*, 88 id. 629; *Seward v. Wales*, 40 App. Div. 539.)

It is urged, however, that the county judge has excused the petitioner from making the service required by such section 2205, and

has substituted therefor the order to show cause that was granted on September fourth; and his authority to do so is claimed to be given by section 780 of the Code. That section provides that if notice of a motion or of any other proceeding in an action (or in a special proceeding it may be conceded) before a court or a judge is necessary, it must, if personally served, be at least an eight days' notice, except where special provision is otherwise made by law or by the General Rules of Practice; unless the court or a judge, upon an affidavit showing grounds therefor, makes an order to show cause why *the application* should not be granted, and in such order directs that a service of less than eight days before it is returnable be deemed sufficient. Very evidently this section applies to matters that are already pending and over which the court has already acquired jurisdiction. In those instances, where by that section a motion of eight days is required, a judge may, on cause shown, require a less time by an order to show cause; but as to any of those steps that are required by statute to be taken in order to inaugurate a new action or proceeding such section cannot be made applicable. It may be said of this section, as was said of rule 38 of the General Rules of Practice by the Court of Appeals in *Matter of Argus Co.* (138 N. Y. 557, 566), that it "may well be construed as referring alone to those incidental applications ordinarily denominated motions, which are made during the progress of an action or special proceeding after its commencement, and not as embracing an application which is the foundation of a statutory remedy."

The proceedings for the discharge of an imprisoned debtor are not commenced until the petition, schedules and affidavit, with due proof of service, as prescribed in section 2205 are presented to the court. (See Code Civ. Proc. § 2208.) Therefore, when the order to show cause was granted, there was no proceeding whatever pending, in which the order could be deemed to have been made. There was no motion to be then made which under section 780 could be made in eight days, and which the petitioner might, under the same section, ask permission to make on a less time. But the order was in effect a mere permission by the county judge to the debtor to inaugurate the proceedings in a method different from that required by statute. It was a changing of the provisions of section 2205, and not a mere change of

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the eight days' notice of motion provided for in section 780 of the Code. For such reason section 780 has no application whatever to the situation. It conferred no authority upon the county judge to dispense with the service required by section 2205, and, therefore, the case stands as if no service whatever under that section had ever been made. The county judge might as well have dispensed with the service of the petition and schedule altogether as to have made the order which he did make, and, in effect, the County Court has made the order of discharge without any service whatever having been made upon the judgment creditor. Within the cases above cited such an order would be utterly unwarranted and should not be sustained.

The order appealed from must be reversed, with costs.

All concurred, except HOUGHTON, J., not voting.

Order reversed, with ten dollars costs and disbursements.

CHARLES MOORE, as Administrator, etc., of DANIEL WESLEY MOORE,
Deceased, Respondent, v. THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, Appellant.

Life insurance — meaning of words "to excess" in the question "Have you ever used liquor to excess?" — verdict that the insured had not used liquor "to excess" set aside as contrary to the evidence.

The phrase "to excess," used in the following question contained in an application for a life insurance policy: "Have you ever used liquor to excess?" is equivalent to "excessively" or "intemperately."

The fact that the insured, who answered the question in the negative, had been intoxicated at various times preceding the making of the application, does not establish, as matter of law, that the insured used liquor "to excess," but that question is one of fact for the determination of the jury.

A verdict that the insured had not used liquor "to excess" should, however, be set aside as against the weight of evidence, where it appears that all of the witnesses sworn on both sides, except the defendant's solicitors, had seen the insured intoxicated on one or more occasions; that on four occasions prior to making the application he had been arrested for public intoxication, and three times, at least, had pleaded guilty to the charge, and that at another time he was unable to complete work which he had solicited, because of his intoxicated condition.

APPEAL by the defendant, The Prudential Insurance Company of America, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Saratoga on the 15th day of October, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 22d day of October, 1903, denying the defendant's motion for a new trial made upon the minutes.

John Foley, for the appellant.

Edgar T. Brackett, for the respondent.

HOUGHTON, J. :

The plaintiff's intestate at the time of his death held two policies of life insurance issued by the defendant. The policies were for small amounts. Application for the first was made on the 30th of November, 1901, and application for the second on the 20th of November, 1902. In each application the insured was asked the following question: "Have you ever used liquor to excess?" to which he answered, "No." The sole defense is that these answers were false. To establish its contention the defendant proved that within several years preceding the applications for the policies the insured had been intoxicated at various times. The insured died in April, 1903.

The court left it to the jury to say whether the proofs showed that the insured habitually used intoxicating liquor to excess, and by their verdict they have found in the negative. The defendant insists that, as matter of law, the uncontradicted instances of intoxication avoided the policies. Whether this is so or not depends upon the interpretation which should be put upon the language of the question. Manifestly the question does not mean a single or incidental use of intoxicating liquors. The inquiry is not "did the insured ever use intoxicating liquors," but to what extent did he use them? The expression "to excess" is equivalent to "excessively" or "intemperately." The object of the inquiry also throws light on the meaning of the language. It was not of such importance to the defendant, in determining whether it would accept the risk, to learn whether the applicant had ever tasted intoxicating liquors, or allowed himself to become intoxicated on one or more

occasions, as it was to ascertain whether or not the insured was of temperate habit and did not habitually indulge in the use of intoxicants. Interpreting the question in this manner, as we think we must, it became a question of fact rather than one of law as to whether the insured had prior to his applications habitually used intoxicating liquors to excess, or excessively, or intemperately. (*Van Valkenburgh v. American Popular Life Insurance Company*, 70 N. Y. 605; *McGinley v. United States Life Insurance Co.*, 77 id. 496; *Meacham v. New York State Mutual Benefit Association*, 120 id. 237; *Northwestern Life Insurance Co. v. Muskegon Bank*, 122 U. S. 501, 506; *Mowry v. Home Life Insurance Company*, 9 R. I. 346, 354.)

But the motion for a new trial should have been granted on the ground that the verdict was against the weight of evidence as to such intemperate and habitual excesses. All of the witnesses sworn on both sides, except the defendant's solicitors, had seen the insured intoxicated on one or more occasions. On four occasions prior to the last application he had been arrested for public intoxication and placed in the lockup over night or for several hours, and three times, at least, pleaded guilty on being arraigned before the police magistrate. At another time he was unable to complete work which he had solicited, because of his intoxicated condition, and on promise of reform was re-engaged. With no further explanation of this state of facts than appeared, the finding of the jury was not justified, and the motion should have been granted.

All concurred; CHASE, J., in result.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

CATHERINE GALLAGHER, Appellant, v. JAMES H. GALLAGHER,
Respondent.

Witness—his refusal to answer questions on cross-examination requires the rejection of his testimony in chief—the consent of the party calling him that he be compelled to answer does not alter the rule—effect of the presence of other testimony sufficient to sustain the judgment.

A party has the right to cross-examine a witness produced against him by his adversary, and to have an answer to pertinent questions relating to testimony given on his direct examination. The penalty for a denial of this right is the rejection of the testimony given in chief.

In an action brought by a wife against her husband to obtain a separation, the latter interposed a counterclaim for an absolute divorce.

On the trial the defendant called as a witness the co-respondent, and proved by him facts from which the only legitimate inference was that the plaintiff had committed adultery with him as alleged. On cross-examination the plaintiff asked of the witness the direct question whether he did have intercourse with the plaintiff at the time testified to by him. The witness declined to answer. The plaintiff pressed the question and requested the court to direct the witness to answer, which the court did, the witness still refusing. The request that the witness be compelled to answer was repeated, and an exception taken to the refusal of the court to do so, to which the court replied that he had not refused, and directed that the examination proceed. The witness still declining to answer, the plaintiff moved that his direct testimony upon the point involved be stricken from the record, which motion was denied and an exception taken.

Held, that the court should either have compelled the witness to answer or should have stricken from the record his evidence on the subject, and that his refusal to do so constituted an error requiring the reversal of a judgment awarding the defendant an absolute divorce;

That the judgment would not be permitted to stand, although it appeared that the defendant was willing that the witness should be compelled to answer;

That, as it did not appear that the court did not consider the testimony of the recalcitrant witness, the error could not be said to be harmless, even though there was sufficient other evidence of the plaintiff's adultery.

APPEAL by the plaintiff, Catherine Gallagher, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Ulster on the 5th day of August, 1903, upon the decision of the court rendered after a trial at the Ulster Special Term.

William D. Brinnier and John W. Searing, for the appellant.

Charles Irwin and John E. Hardenburgh, for the respondent.

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HOUGHTON, J. :

The plaintiff brought action for a separation and the defendant by counterclaim alleged adultery on the part of the plaintiff, and asked for an absolute divorce.

The plaintiff's complaint was dismissed by the court and the affirmative relief granted to the defendant.

On the trial the defendant called as a witness the co-respondent, and proved by him facts from which the only legitimate inference was that the plaintiff had committed adultery with him as alleged. On cross-examination the plaintiff asked of the witness the direct question whether he did have intercourse with the plaintiff at the time testified to by him. The witness declined to answer. The plaintiff pressed the question and requested the court to direct the witness to answer, which the court did, the witness still refusing. The request that the witness be compelled to answer was repeated, and an exception taken to the refusal of the court to do so, to which the court replied that he had not refused, and directed that the examination proceed. The witness still declining to answer, the plaintiff moved that his direct testimony upon the point involved be stricken from the record, which motion was denied and an exception taken.

We think this was error, for which the decree must be reversed. The court should either have compelled the witness to answer, or should have stricken from the record his evidence upon that subject. A party has the right to cross-examine a witness produced against him by his adversary, and to have an answer to pertinent questions relating to testimony given on direct examination. The penalty for a denial of this right is the rejection of the testimony given in chief.

The situation of a witness voluntarily testifying to a state of facts and then refusing to go into particulars seldom arises; but the rule applicable to his testimony under such circumstances has long been decided.

In *Kissam v. Forrest* (25 Wend. 651) a trial was had before referees, and at the close of the direct examination of a witness and before the party had an opportunity to cross-examine, the court of its own motion took an adjournment. Pending the adjournment the witness died. The direct testimony was rejected, and on a

motion for a new trial on that ground the court held there was no error. On appeal, under the title of *Forrest v. Kissam* (7 Hill, 463), the judgment was reversed and it was held that the direct testimony must stand. Several opinions were written, and the reversal seems finally to have been put upon the ground that the death of the witness being an act of God neither party should suffer. The chancellor in his opinion, however, uses the following language: "But I admit the rule should be otherwise where the right to cross-examine the witness has been lost by the fault or negligence of the party calling him, or by the misconduct of the witness in departing from the court without permission, or wilfully neglecting to attend at the time and place to which his examination stands adjourned."

In *Smith v. Griffith* (3 Hill, 333) a witness examined on commission had refused on cross-examination to answer material inquiries. In considering whether his direct examination should be read on the trial, the court says: "If the witness had been upon the stand at the time and had refused to answer in defiance of the authority of the court, his whole testimony must have been stricken out of the cause."

The testimony of a witness had been taken by commission in *Sturm v. Atlantic Mutual Insurance Co.* (33 N. Y. 77, 87), and upon cross-examination he also had refused to answer important and material questions. In considering the question the court said: "It may be taken as the rule that where a party is deprived of the benefit of the cross-examination of a witness by the act of the opposite party, or by the refusal to testify or other misconduct of the witness, or by any means, other than the act of God, the act of the party himself, or some cause to which he assented, that the testimony given on the examination-in-chief may not be read."

In *People v. Cole* (43 N. Y. 508) a witness fainted at the close of her direct examination and became so ill that a cross-examination was impossible. The court refused to strike out the evidence given in chief or adjourn the trial until the witness was able to be cross-examined, and it was held error, for which the conviction should be reversed.

The defendant insists that he should not suffer because the court refused to compel his witness to answer, for he was willing that he should, and that the court should compel him to. But a party call-

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ing a witness is, in a sense, responsible for his conduct. If he has been examined in chief and fails to return on an adjourned day for cross-examination, even though the party has endeavored to obtain his attendance, still he must suffer by the loss of his testimony. So, too, if he refuses to answer pertinent questions, it is the misfortune of the party that he is obliged to call a witness entertaining such views.

It is further insisted that the error did no harm, because there is sufficient evidence of the plaintiff's adultery aside from the testimony of the correspondent. While this may be so, we cannot say the error was harmless and that the court did not take into consideration the testimony which should have been rejected.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred.

Judgment reversed on the law and on the facts and new trial granted, with costs to appellant to abide event.

Cases
DETERMINED IN THE
FIRST DEPARTMENT
IN THE
APPELLATE DIVISION,
March, 1904.

FRANK W. WOOLWORTH, Respondent, v. JAY E. KLOCK, Appellant.

Venue — action for libel in which a plea in mitigation of damages is interposed — the county in which the publication was made held to be the proper place of trial.

In an action brought to recover damages for the publication of a libel in a newspaper published in Ulster county, the defendant interposed an answer consisting solely of a plea in mitigation of damages. The action was brought in the county of New York, but there was no averment in the complaint that the libel was published in that county. All the witnesses upon the subject of the plaintiff's damages, with the exception of the plaintiff himself, resided in Ulster county.

Held, that the venue of the action should be changed to Ulster county.

APPEAL by the defendant, Jay E. Klock, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 15th day of October 1903, denying the defendant's motion to change the place of trial of the action from the county of New York to the county of Ulster.

A. T. Clearwater, for the appellant.

Joseph B. Handy, for the respondent.

PER CURIAM:

This action is brought to recover damages for the publication of a libel in defendant's newspaper, published at Kingston in the county of Ulster. The publication of the libel is admitted, and the

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answer, in all essential respects, is a plea in mitigation of damages, and such is the question which will be litigated upon the trial. The action is transitory in its nature, and there is no averment in the complaint that the libel was published in the city and county of New York. Whatever damages the plaintiff has sustained from this publication would seem to be limited to such as he has sustained in the locality in which the paper was published and circulated, and the witnesses upon such subject, save the plaintiff, are shown to reside there. Within the ruling of this court in *Rogers v. Butler* (71 App. Div. 613) the proper place for the trial of the action would seem to be the county of Ulster.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and the motion granted.

Present — VAN BRUNT, P. J., PATTERSON, INGRAHAM, HATCH and LAUGHLIN, JJ.

Order reversed, with ten dollars costs and disbursements, and motion granted.

E. H. OGDEN LUMBER COMPANY, Respondent, v. AMAND BUSSE,
Appellant.

Removal of steel beams from a building existing on real property at the time of the execution of a mortgage thereon—right of the mortgagee to sue therefor without alleging insolvency on the part of the mortgagor—measure of damages—when it is the cost of restoration and when the diminution in market value.

In an action brought by the holder of a bond and mortgage to recover damages for injuries done to the mortgaged premises, it appeared that the defendant, after having been served with the summons and complaint in an action to foreclose the mortgage, removed from the mortgaged premises a number of steel beams and lintels which had theretofore, before the execution of the mortgage, been incorporated into the building. The complaint in the action did not allege the insolvency of the mortgagor, but did allege that the value of the plaintiff's security was impaired by the defendant's acts.

Held, that the foundation of the action was the impairment of the security of the mortgage with knowledge of the lien, and that it was not incumbent upon the plaintiff to allege the insolvency of the mortgagor;

That the admission over the defendant's objection of proof of the mortgagor's insolvency did not require the reversal of a judgment in favor of the plaintiff;

That evidence of the cost of restoring the mortgaged premises to their former condition and of the diminution in the market value thereof was admissible; That if the cost of repairing the injury was less than the diminution in the market value, the cost of repair, with an allowance for the loss of the use of the property in consequence of the injury, was the proper measure of damages, but that if the cost of repair was more than the diminution in the market value, the latter was the true measure of damages; That if the plaintiff's proof was confined to one of these two methods of ascertaining the damages, and the defendant failed to offer any proof as to the other method or to raise any question on the trial as to the failure of the plaintiff to supply it, the defendant could not avail himself of such omission on appeal.

APPEAL by the defendant, Amand Busse, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 26th day of May, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 7th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

Almet Reed Latson, for the appellant.

F. K. Pendleton, for the respondent.

VAN BRUNT, P. J. :

This action was brought by the plaintiff as the holder of a bond and mortgage executed by one Wetterer, the then owner of certain property situate in the city of New York, to recover damages for an injury by the defendant to the mortgaged premises, whereby the plaintiff's security was impaired. The complaint contained no allegations of the insolvency of the mortgagor, but alleged that the value of the plaintiff's security was diminished by the acts of the defendant.

Upon the trial the plaintiff proved his mortgage; that an action was begun to foreclose the same, and the summons and complaint therein were served upon the defendant in this action; and that subsequent thereto the defendant entered upon the mortgaged premises and removed from the buildings, injuring the walls in so doing, fifty-three steel beams and a number of lintels, all of which had been inserted in the wall and become a part of the building before the execution of the mortgage, and thereby impaired the security of the mortgage. The plaintiff also, over the objection of the defendant,

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introduced evidence tending to show the insolvency of the mortgagor; and also introduced proof tending to show the extent to which the value of the premises was diminished by reason of the acts of the defendant.

It is objected upon the part of the defendant that the admission of the evidence of the insolvency of the mortgagor, in the absence of any allegation in the complaint to that effect, was improper, and that the absence of such an allegation in an action of this description is fatal. It seems to us that if such an allegation in the complaint was necessary, the admission of the evidence in question over the objection would necessarily call for a reversal of the judgment. Our attention has been called, amongst others, to the cases of *Lane v. Hitchcock* (14 Johns. 213); *Gardner v. Heartt* (3 Den. 232), and *Van Pelt v. McGraw* (4 N. Y. 110). The cases of *Lane v. Hitchcock* and *Gardner v. Heartt* arose under the old system of pleading, and they held distinctly that an allegation of insolvency was a necessary ingredient of a complaint in an action of waste. It would seem, however, that a different rule, under the Code system of pleading, was recognized in the case of *Van Pelt v. McGraw*. In that case it was held that the foundation of the action was the impairment of the security of the mortgage, with knowledge of the lien; and this seems to be the true rule which should govern in cases of this description. Suppose, for example, that a party has a mortgage upon premises, which has five years to run, and a third party, with knowledge of the lien, enters upon the mortgaged premises and does acts which impair the security of the mortgage, can it be that he cannot recover damages for such impairment because the obligor in the bond is at the time solvent, while five years hence, when he can be called upon to pay the mortgage, he may be good for nothing? The mortgagee, in taking the security of a mortgage for the payment of a bond, is looking to the security which he obtains by the mortgage, and not necessarily to the responsibility of the maker of the bond. Any other rule would be compelling a mortgagee to rely upon a personal obligation, when he supposed he was obtaining the security of real estate for the loan of his money. We think, therefore, that the allegation of insolvency was not necessary, the action resting upon the impairment of the security, and that although

the evidence in question was improperly admitted, it could not have done any possible harm and forms no ground for reversal.

It is further claimed that there was no evidence that the defendant knew of the lien which the plaintiff had upon the premises in question. It is difficult to see how he could have been ignorant of it, when it was established beyond question that he had been served with the summons and complaint in an action for foreclosure prior to the doing of the acts which form the basis of this action. The acts complained of were such as clearly tended to diminish the security of the mortgage, being the dismantling of an uncompleted building by the removal of material which had been incorporated therein.

It is further urged that an erroneous rule of damages was adopted by the court in submitting the case to the jury; and that this was error in view of the fact that the court excluded evidence on defendant's behalf as to the cost of restoring the premises to their condition before the alleged waste was committed, and confined him solely to proof as to diminution of value. In support of this contention the case of *Hartshorn v. Chaddock* (135 N. Y. 116) is cited. In this case it was held that evidence both of the cost of restoring the land to its former condition, and as to the diminution of its market value is admissible; and the rule is laid down that when the reasonable cost of repairing the injury, or the cost of restoring the land to its former condition is less than the diminution in the market value of the whole property by reason of the injury, the cost of restoration is the proper measure of damages, to which may be added the loss of the use of the property in consequence of the injury; but when the cost of restoring is more than such diminution, the latter is usually the true measure of damages. The rule is further laid down that when damages are to be assessed upon one or the other of these two methods according to the circumstances, and the plaintiff's proof is confined to one of them, and the defendant fails to offer proof as to the other, or to raise any question on the trial as to the failure of the plaintiff to supply it, the omission may not be availed of on appeal. Therefore, if the defendant had, as he claims to have done, offered proof as to the cost of restoring the premises to their former condition, and it had been excluded, it would have been error. But we fail to find in the case any such offer of proof. It is true

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he put a witness upon the stand and asked him whether he was familiar with the price of certain of the materials which had been removed, and the witness stated that he was familiar with the price of those articles in the fall of 1899 and the spring of 1900. He was asked what was the market price. This was objected to, the objection sustained, and an exception taken; and this was the only attempt to prove what would be the cost of restoration. This evidence was not offered upon that issue, and it is clear that it was sought to be introduced on the question of damages, upon the allegation of conversion contained in the complaint. Under these circumstances, it does not appear that the defendant made any attempt to prove the cost of restoration for the purpose of showing that it was less than the diminution in value, nor that he called the attention of the court to the fact that such proof would be competent, upon the measure of damages which should obtain in the action. Indeed, when the plaintiff stated that the damages sustained were the difference in the value of the property before the acts committed and afterwards, the defendant raised no objection. It would seem, therefore, that the defendant failed to establish any error in the ruling of the court in respect to damages.

The judgment and order appealed from should be affirmed, with costs.

PATTERSON, INGRAHAM, HATCH and LAUGHLIN, JJ., concurred.

Judgment and order affirmed, with costs.

FREDERICK CLARKE WITHERS and WALTER DICKSON, Respondents,
v. THE CITY OF NEW YORK, Appellant

The employment of an architect by the commissioner of correction of the city of New York is authorized by chapter 626 of the Laws of 1896 — term of such employment — a premature employment made effective by ratification.

Chapter 626 of the Laws of 1896 authorized the commissioner of correction of the city of New York, with the approval of the board of estimate and apportionment, to construct additions to the city prison.

Section 2 of the statute provided: "The said commissioner of correction and the said board of estimate and apportionment are each hereby authorized to employ a competent architect to prepare or examine any plans for any work proposed to be done under the provisions of this act. * * *

Section 3 provided: "When any work provided for by this act shall have been authorized, and the plans and specifications therefor approved by the board of estimate and apportionment, the said commissioner of correction shall proceed to execute and carry out said work, which shall be done by contract. * * *"

Section 4 directed the comptroller to issue consolidated stock "For the purpose of carrying out the work authorized by this act, including the compensation of the architects employed by said commissioner of correction to prepare plans and specifications and to supervise the work done thereunder and of the architect employed by the board of estimate and apportionment to examine any plans and specifications."

Held, that the statute contemplated that the commissioner of correction and the board of estimate and apportionment should each employ a competent architect to prepare or examine any plans for any work proposed to be done under the act;

That the commissioner of correction also had power to employ an architect to supervise the work done thereunder, but that this additional power could not be exercised by the commissioner of correction until the board of estimate and apportionment had approved the plans;

That the employment by the commissioner of correction of an architect for the purpose of preparing plans and specifications and of supervising the work would terminate upon the completion of the work, and not upon the expiration of the term of office of the commissioner of correction;

That the employment of an architect by the commissioner of correction prior to the time when the act went into effect, was rendered effective by ratification after the act took effect.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 22d day of May, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 25th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

Terence Farley, for the appellant.

Albert Stickney, for the respondents.

VAN BRUNT, P. J.:

This action was brought to recover damages for an alleged breach by the defendant of a contract of employment of the plaintiffs as architects to prepare plans and specifications and to supervise the construction of the new wing and other additions to the city prison.

The main questions presented upon this appeal are the claim upon the part of the city of the want of power in the commissioner of correction to appoint architects in reference to the building of the

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new wing and other additions to the city prison, whose employment should continue beyond the term of office of the commissioner, and that the appointment of the plaintiffs by the commissioner of correction on the 27th day of April, 1896, was illegal, in that the act under which the appointment was made did not go into effect until May 13, 1896.

In respect to the latter objection, it is sufficient to say that the subsequent action of the commissioner in reference to the connection of the plaintiffs with the work in question, the acceptance of their plans and specifications, and their supervision of the work, was clearly a ratification of the appointment made on the 27th of April, 1896, although such appointment was made prior to the time when the act in question went into effect.

The provisions of the act under which the appointment was made (Laws of 1896, chap. 626), which relates to the questions involved in this action, read as follows:

"Section 1. The commissioner of correction in the city of New York, with the consent and approval of the board of estimate and apportionment of said city, expressed as hereinafter provided, is hereby authorized and empowered to erect * * * such additions to and extensions of existing buildings, under the jurisdiction and control of the department of correction * * * as, in the opinion of said commissioner of correction and of said board of estimate and apportionment, shall be necessary for the proper maintenance * * * of the criminals * * * under the jurisdiction of said commissioner of correction, including, in the discretion of said commissioner and said board of estimate and apportionment, the rebuilding or extension of the present city prison, known as the 'Tombs.' * * *

"§ 2. Before proceeding to * * * make any alterations or improvements as authorized by the last preceding section, the said commissioner of correction may, from time to time, present to the said board of estimate and apportionment a statement of any work proposed to be done, with plans and specifications therefor, and an estimate of the approximate probable cost thereof, whereupon the said board of estimate and apportionment may, by resolution, authorize said work to be done wholly or in part, and may approve the plans and specifications therefor, or may return the same to

said commissioner for modification or alteration, * * * and said plans and specifications may be so returned to said commissioner and resubmitted to said board of estimate and apportionment until the said board of estimate and apportionment shall, by resolution, approve said plans and specifications and authorize the work to be proceeded with accordingly. The said commissioner of correction and the said board of estimate and apportionment are each hereby authorized to employ a competent architect to prepare or examine any plans for any work proposed to be done under the provisions of this act. * * *

“§ 3. When any work provided for by this act shall have been authorized, and the plans and specifications therefor approved by the board of estimate and apportionment, the said commissioner of correction shall proceed to execute and carry out said work, which shall be done by contract. * * *

“§ 4. For the purpose of carrying out the work authorized by this act, including the compensation of the architects employed by said commissioner of correction to prepare plans and specifications and to supervise the work done thereunder and of the architect employed by the board of estimate and apportionment to examine any plans and specifications, * * * the comptroller of the city of New York is hereby directed, from time to time, when thereto directed by the board of estimate and apportionment, ‘to issue consolidated stock * * * .’”

It seems to have been contemplated by this act that the commissioner of correction and also the board of estimate and apportionment were each empowered to employ a competent architect to prepare or examine any plans for any work proposed to be done under the provisions of the act; and that it was intended that the commissioner of correction should have additional power, namely, to employ an architect to supervise the work done thereunder, which was a necessary power to be lodged somewhere, as is evidenced by section 4 of the act in question, which, as above stated, provides that “for the purpose of carrying out the work authorized by this act, including the compensation of the architects employed by said commissioner of correction to prepare plans and specifications and to supervise the work done thereunder, and of the architect employed by the board of estimate and apportionment to examine any plans and

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specifications," the comptroller was directed to issue consolidated stock. It will thus be seen that while the provision for the payment of the architect employed by the board of estimate and apportionment was limited to the work of examining the plans and specifications, the provision for the payment of the architect employed by the commissioner of correction was not only for the preparation of plans and specifications, but for supervision of the work done thereunder, there being a clear distinction between the duties which were to be performed by the architects employed by the board and those employed by the commissioner. It would seem, therefore, that under the act itself the commissioner had the power to employ the plaintiffs not only to prepare plans and specifications, but to supervise the work, which meant the work during its progress.

But it is claimed that where authority is given to a municipality or official board to contract, without any specification of the term, the municipality or board can contract only for a reasonable period, to be determined usually by the tenure of office of the official board. We do not think that the rule sought to be invoked has any application to the case at bar. Here was a municipal building to be erected. The necessity for the appointment of architects for the purpose of preparing plans and specifications and supervising the work is recognized by the statute. The employment was one having a specific object, and would necessarily terminate upon the completion of the buildings which were to be erected under the authority of the statute. There is no reason why a contract of employment in reference to this specific work until its completion should not be entered into any more than any other contract in connection with any public building, the erection of which is liable to extend beyond the term of office of the individual members of the board authorized to make the contract.

There seems, however, to be a difficulty in the way of sustaining the recovery of the plaintiffs in this action in the fact that there is no evidence that any of the plans and specifications of the plaintiffs in respect to the work which was done after their removal had ever been approved by the board of estimate and apportionment. While it may be true that the commissioner of correction had the power to appoint a competent architect to prepare the plans, yet, until these plans were approved by the board of estimate and apportionment,

he had no power to go any further with the work or to employ any person to supervise the same during its construction. Section 3 of the statute provides that when any work provided for by the act shall have been authorized, and the plans and specifications therefor approved by the board of estimate and apportionment, the commissioner of correction shall proceed to execute and carry out said work, which was to be done by contract. There is an express separation throughout the whole of the act between the primary work of preparing plans and specifications and the doing of the work after such plans had been approved and the work authorized. In the case at bar there is no evidence whatever that the plans and specifications of the plaintiffs in reference to this new work were ever approved and accepted by the board of estimate and apportionment, which was a prerequisite to the authority of the commissioner to proceed with the work, or to incur any expenditure in connection therewith.

There is another objection which seems to be fatal to the recovery, and that is to the charge of the court that the plaintiffs were entitled to a verdict of five per cent on the amount of the estimated cost, less the amount which they would have expended in carrying out the contract. This instruction was excepted to. We think that under the evidence there was a question for the jury as to whether there was any agreed compensation or not. One of the plaintiffs testified to a conversation with Mr. Wright, in which he stated that they were to get five per cent, the usual price. Mr. Wright testified as to this five per cent, that he did not know that anything was said about the percentage at all; and he added: "I assumed he would get the regular percentage." The claim being made that the plaintiffs sought to recover upon an agreed percentage, this condition of the evidence left the question for the jury upon that point.

We are of opinion, therefore, that the judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide event.

PATTERSON, HATCH and LAUGHLIN, JJ., concurred; INGRAHAM, J., concurred in result.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

ANTONIA ROTONDO, as Administratrix, etc., of VINCENZO ROTONDO,
Deceased, Respondent, v. NEPTUNE B. SMYTH, Appellant.

Scaffold constructed by the employee falling therefrom — the master is not liable when the scaffold does not comply with section 18 of chapter 415 of the Laws of 1897.

In an action brought to recover damages resulting from the death of the plaintiff's intestate while in the employ of the defendant, a boss painter, it appeared that the intestate and one Nelson were directed to paint the shutters on a factory building; that, the space being so restricted that the ordinary scaffolds could not be used, the defendant instructed Nelson and the intestate to construct one; that Nelson and the intestate constructed, out of material procured by them from the defendant's shop, a scaffold which did not comply with section 18 of chapter 415 of the Laws of 1897, which provides: "Scaffolding or staging swung or suspended from an overhead support, more than twenty feet from the ground or floor, shall have a safety rail of wood, properly bolted, secured and braced, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, and properly attached thereto, and such scaffolding or staging shall be so fastened as to prevent the same from swaying from the building or structure."

The evidence tended to show that while the intestate was standing upon, or stepping from the sill of a window to the scaffold, he lost his balance and fell in consequence of the swaying of the scaffold.

Held, that the scaffold having been constructed by the intestate and his companion, and not by the defendant, the latter was not liable because the scaffold did not comply with the law nor because it was not so fastened as to prevent it from swaying.

O'BRIEN, J., dissented.

APPEAL by the defendant, Neptune B. Smyth, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 18th day of May, 1903, upon the verdict of a jury for \$2,000, and also from an order entered in said clerk's office on the 28th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

L. Sidney Carrère, for the appellant.

Martin Wechsler, for the respondent.

VAN BRUNT, P. J. :

This action was brought to recover damages arising from the death of the plaintiff's intestate, who fell while doing some painting upon

a building. The defendant in this action was a boss painter and had a contract to paint the factory building at No. 78 Park street, in the city of New York. The plaintiff's intestate was a journeyman painter, who was employed by the defendant upon this job. Upon the 21st of November, 1902, the defendant's employees, consisting of plaintiff's intestate and one Nelson, commenced to paint the window shutters in the rear of the factory beginning on the top or seventh floor. In consequence of the contracted space in which the painting was to be done, the ordinary scaffolds which were made for work of this kind could not be used; and the defendant instructed Nelson and the deceased to construct a scaffold and put it up for the purpose of doing the painting. The two men procured from the defendant's shop the necessary materials, and constructed the scaffold, which consisted of three two-inch planks of about sixteen feet in length, held together by four wooden cleats which were longer than the scaffold was wide. These cleats were nailed across the planks in pairs a few feet from each end. Around this scaffold were then placed scaffold irons which were adjusted under the planks and between the cleats, the object of the cleats being to prevent the scaffold irons from slipping one way or the other along the planks. These irons were connected with the roof by blocks and tackles. Across the back of the scaffold on the side furthest from the wall the men had stretched some pieces of rope three feet above the scaffold as a guard against accidents.

On the morning of the twenty-first of November Nelson and the deceased had raised this scaffold to position and commenced the work of painting the iron shutters on the top floor. The deceased began painting the shutters of the window near the end of the scaffold, and he either stood upon the sill in the act of painting the shutters, holding on by an iron crossbar in the middle of the window or was stepping from the window sill to the scaffold when he fell and was killed. The claim of negligence against the defendant is that the scaffold upon which this work was being done did not comply with section 18 of chapter 415 of the Laws of 1897, which provides as follows:

"Scaffolding or staging swung or suspended from an overhead support, more than twenty feet from the ground or floor, shall have a safety rail of wood, properly bolted, secured and braced, rising at

least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, and properly attached thereto, and such scaffolding or staging shall be so fastened as to prevent the same from swaying from the building or structure."

It is certain that the scaffold did not comply with this law ; but it seems to us, in view of the evidence that it was constructed by the workmen who were to work upon it and was in their charge and under their control, that such scaffold did not come within the provisions of the act referred to, so as to charge the defendant with negligence for want of compliance with the statute. The men who were to do the work themselves constructed it, and the defendant had nothing to do with it and did not furnish the scaffold as a scaffold. It was prepared by the painters themselves ; and, therefore, if there were any negligence in its construction, they were liable for it and not the defendant.

It is further claimed that the statute was not complied with in that the scaffold was not so fastened as to prevent the same from swaying from the building or structure. If this portion of the law was not complied with, it was the fault of the men who were working upon the scaffold. They were the ones whose duty it was to fasten it in the manner required by the act. The defendant, the employer, was not responsible for the manner in which they conducted themselves in the doing of the work. They were bound to see, under the circumstances, that the scaffold was properly secured, and if it were not so secured it was the fault of the workmen themselves, and no negligence on that account is to be imputed to the defendant.

It was claimed upon the part of the defendant upon the trial that the deceased did not fall from the scaffold, but was standing upon the window sill holding on by the crossbar and when the crossbar gave way he fell. There is evidence controverting this claim, to the effect that he was stepping from the sill to the scaffold and, the scaffold swaying, he lost his balance and fell. The evidence, however, that he had the crossbar in his hand when he fell and the position he must have occupied in order to reach the crossbar would militate against this claim of the plaintiff and would seem to support that of the defendant. There may have been sufficient, however, in the

testimony of the witnesses upon this point to submit the case to the jury. But we think that upon the question of the negligence of the defendant in the furnishing of the scaffold and its management there was no evidence tending to charge him with negligence, and if there was any negligence it was that of the deceased and Nelson who constructed the scaffold and were working together upon it.

We think, therefore, that the judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

INGRAHAM, McLAUGHLIN and LAUGHLIN, JJ., concurred; O'BRIEN, J., dissented.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

MARY KEATING, Respondent, v. JOHN L. B. MOTT, Appellant.

A tenant falling in a dark hall in a tenement house from catching her foot in the oilcloth—contributory negligence, not inferred as matter of law because of her knowledge of the conditions—duty imposed thereby—admission of present ownership of the demised premises and denial of all the other allegations of the complaint—it is not a denial of ownership at the time mentioned in the complaint.

A tenant who, while walking through a dark hallway in a tenement house, sustains injuries in consequence of catching her foot in some holes in the oilcloth covering the floor of the hallway, cannot be said, as a matter of law, to have been guilty of contributory negligence because she knew of the torn condition of the oilcloth, but that question is one of fact for the consideration of the jury.

Her knowledge of the condition of the hallway imposed upon her the duty of using due care to avoid the danger, but it cannot be said that she failed in this duty by neglecting to keep constantly in mind the exact location of the holes in the oilcloth.

The complaint in the action brought by the tenant to recover damages for the injuries sustained by her alleged that at all times therein mentioned the defendant was the owner of the premises. The answer alleged: "*First*. This defendant admits that he is the owner of the fee of certain premises in the city of New York, commonly known as No. 445 West Thirty-ninth street, and this defendant, upon information and belief, denies each, all and every the other allegations in said complaint contained."

Held, that the provision of the answer was not a denial of the defendant's ownership of the premises at the time mentioned in the complaint, but would be regarded rather as an admission of that fact.

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APPEAL by the defendant, John L. B. Mott, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of October, 1902, upon the verdict of a jury for \$1,500, and also from an order entered in said clerk's office on the 17th day of November, 1902, denying the defendant's motion for a new trial made upon the minutes.

Thomas P. Wickes, for the appellant.

W. A. Purrington, for the respondent.

PATTERSON, J. :

The plaintiff was a tenant occupying rooms on the second floor of a tenement house, known as No. 445 West Thirty-ninth street, in the city of New York, and she alleged in her complaint that she sustained injuries on such premises through the neglect of the defendant to maintain in a safe condition the lower hallway thereof. A question arose on the trial as to the necessity of the plaintiff proving under the pleadings the ownership of the premises. It is alleged in the complaint that at all times thereafter mentioned the defendant was the owner of that house. The answer contains this allegation : "*First*. This defendant admits that he is the owner of the fee of certain premises in the city of New York, commonly known as No. 445 West Thirty-ninth street, and this defendant, upon information and belief, denies each, all and every the other allegations in said complaint contained." That is not a denial of the ownership of the premises at the time mentioned in the complaint and it will be regarded rather as an admission of that fact. The appellant does not now seriously insist upon the objection that the plaintiff failed to prove the ownership, but the question remains in the record and it is enough to say in regard to it that, apart from the pleadings, there is proof made by the testimony of the janitress and others, sufficient to show that at the time of the alleged accident the defendant was in possession of the premises.

The accident happened on the 9th of March, 1899. The plaintiff at about five o'clock in the afternoon entered the hallway on the main floor to go to her rooms, and according to her testimony and that of another witness she caught her foot in some holes in

the oilcloth on the floor at the foot of the staircase and she fell and was injured. There were two questions of fact as to which there was conflicting evidence, and they were settled by the verdict of the jury. The defendant claimed that the oilcloth had been removed just one month before the alleged accident, and also that the plaintiff did not fall at the place or in the manner indicated by her or her witness. Both of these facts being found against the defendant, there is no reason to interfere with the conclusion the jury reached regarding them.

The principal contention of the appellant is that the proof wholly fails to show that the plaintiff was free from contributory negligence. She testified that from the time she began her occupation of the rooms (about the nineteenth of January) the oilcloth was filled with holes, and other witnesses testified to the same fact. On her testimony, the hallway was an unsafe place, and it is beyond question that she knew and thoroughly understood it to be such. The point made by the appellant is that, under such circumstances and with the plaintiff's knowledge, she was bound to exercise extraordinary care in traversing this hallway, and that the proof fails to show that she did exercise that degree of care required of her. It is not claimed that it would be contributory negligence on the part of this tenant to use this hallway in its unsafe condition. Although the plaintiff had knowledge of the condition, that did not necessarily charge her with contributory negligence as matter of law in continuing to live on the premises and to pass over the hallway. It imposed upon her the duty of using due care to avoid danger, and it cannot be said that she failed in that respect by not constantly having in mind the exact locality of the holes in the oilcloth. (*Dollard v. Roberts*, 130 N. Y. 269; *Kenney v. Rhinelanders*, 28 App. Div. 246; *affd.*, 163 N. Y. 576.) The accident happened on a snowy afternoon in March, and the plaintiff's testimony indicated that she was walking along towards the stairway in an ordinary and usual way. The hallway was dark. It was for the jury to say whether she was guilty of contributory negligence, and it cannot be held, as matter of law, on this record, that she was chargeable with any negligent act or omission that contributed to the accident.

The plaintiff's counsel asked the court to charge "that the plaintiff was not bound, as a matter of law, to keep her mind constantly

fixed upon the condition of the hall; nor was she necessarily chargeable with negligence if her thoughts or attention were momentarily diverted from it by natural or unavoidable circumstances." The court substantially charged that, and then the plaintiff's counsel said, "Nor was she responsible for it if her mind was diverted from it by ordinary cause." To which the court replied, "If she was reasonably prudent." The counsel for the defendant excepted "upon the specific ground that there is no evidence in the case that her mind was diverted or that her attention was distracted." This exception does not raise any substantial question, for the charge of the judge was correct respecting the duty of the plaintiff. The court still adhered to the proposition that no matter what may have been the situation of the plaintiff at that time, she was bound to reasonable prudence. That is precisely what was required of her — the phrase "if she was reasonably prudent" being the equivalent of "using due care."

The defendant's counsel requested the court to charge that "If the jury find from the evidence that the plaintiff knew of the condition of the hall and of the holes at the time of the accident, and did not take care to avoid the accident, the jury may find that she was not free from contributory negligence, and the verdict must be for the defendant." To which the court replied, "Except as I may have charged, I will not charge it." A perusal of the main charge sufficiently shows that the substance of this request was fully covered.

The damages are not excessive and the judgment and order should be affirmed, with costs.

VAN BRUNT, P. J., INGRAHAM, HATCH and LAUGHLIN, JJ., concurred.

Judgment and order affirmed, with costs.

GEORGE KITCHING and Others, Appellants, v. KATE C. BROWN,
Respondent.

Covenant prohibiting the erection of a tenement house on land conveyed — an apartment house does not come within its prohibition.

A deed contained a covenant prohibiting the erection on the land conveyed of any stable of any kind, coal yard, slaughterhouse, meat shop, tallow chandlery, steam engine, smith shop, forge, furnace, brass foundry, nail or other iron foundry, or any manufacturing of glass, gunpowder, starch, glue, varnish, vitriol, ink, petroleum or turpentine, or any cooper's, carpenter's or cabinet maker's shop, or any establishment for tanning, dressing, preparing or keeping skins, hides or leather, or any brewery, distillery, sugar refinery or bakery, or drinking or lager beer establishment, circus, menagerie or public show or exhibition of animals, railroad depot, railroad stable, car engine or *tenement house*, or any other trade, manufactory, business or calling which may be in any way dangerous, noxious or offensive to the neighboring inhabitants.

Held, that the covenant did not prohibit the erection on the premises of three modern apartment houses seven stories high with two apartments on each floor, which cost \$400,000, and were of a character and appearance corresponding with the first-class dwelling houses in the immediate neighborhood;

That such houses were not "tenement houses" within the meaning of the covenant.

VAN BRUNT, P. J., and LAUGHLIN, J., dissented.

APPEAL by the plaintiffs, George Kitching and others, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 28th day of March, 1902, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

Henry W. Hardon, for the appellants.

Harold Swain, for the respondent.

PATTERSON, J.:

At the trial of this cause at Special Term the complaint was dismissed upon the merits. The action was brought by owners of dwelling houses on the southerly side of Seventy-first street, west of West End avenue, in the borough of Manhattan in the city of New York. Adjoining the premises owned by the plaintiffs and to the west thereof, are situated lots of land belonging to the defendant, upon which apartment houses have been built. Title to the lots, both of the plaintiffs and of the defendant, is derived from convey-

ances made by the executors of one Jacob Harsen, and all such lots are affected by a covenant which is in the following words:

"And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant to and with the said parties of the first part, their successors and assigns, and with the owners for the time being of the adjacent lots, jointly and severally, that neither the said party of the second part, nor his heirs nor assigns, shall or will, at any time hereafter, erect any buildings within forty feet of the front of said premises, except of brick or stone, with roofs of slate or metal, and will not erect or permit upon any part of said premises any stable of any kind, coal yard, slaughterhouse, meat shop, tallow chandlery, steam engine, smith shop, forge, furnace, brass foundry, nail or other iron foundry, or any manufacturing of glass, gunpowder, starch, glue, varnish, vitriol, ink, petroleum or turpentine, or any cooper's, carpenter's or cabinet maker's shop, or any establishment for tanning, dressing, preparing or keeping skins, hides or leather, or any brewery, distillery, sugar refinery or bakery, or drinking or lager beer establishment, circus, menagerie or public show or exhibition of animals, railroad depot, railroad stable, car, engine or tenement house, or any other trade, manufactory, business or calling which may be in any way dangerous, noxious or offensive to the neighboring inhabitants, and that no building shall be erected upon said lands, or any of them, which shall contain any alley or entrances running through them for ingress or egress to rear building. And it is declared that this covenant is a lien and runs with said lands, and binds the persons seized thereof for the time being."

The defendant's property has a frontage of one hundred and fifty-three feet on Seventy-first street, and on the west immediately adjoins the Hudson River railroad. The defendant has constructed on her property three modern apartment houses, seven stories high, with two apartments on each floor. Those structures are high-class apartment houses, and they have all the conveniences and all the appliances of the best order of such houses; and externally, in their architecture, they are of a character and appearance corresponding with the first-class dwelling houses in the immediate neighborhood. They are costly buildings, the amount expended in their erection being about \$400,000. The houses are completed and ready for occupancy. The sole question presented for con-

sideration on this appeal is, whether these structures of the defendant have been put up in violation of the covenant above quoted and are of such a character as to entitle the plaintiffs to an injunction.

We have had a covenant identical with this before us in the case of *White v. Collins Building & Construction Co.* (82 App. Div. 1), and there the question considered was the following: "Does the covenant against nuisances contained in the deed of * * * surviving executors of the last will and testament of Jacob Harsen, M. D., deceased, * * * dated June 10th, 1873, prohibit the construction of a high grade modern apartment house?" In considering that case we endeavored to ascertain the intention of the parties in making the covenant, and the result was that we construed the words "tenement house," in connection with other interdicted structures and uses of a nature that would injure the general character of the neighborhood and make it inappropriate for the residence of refined and prosperous people; and it is said in the opinion that "it is common knowledge that in the year 1873, and prior to that time, modern apartment houses were unknown in the city of New York." And it is further said: "An apartment house, the erection of which is contemplated by the defendant, would clearly not be a use of the property which would be dangerous, noxious or offensive to the neighboring inhabitants. What was clearly contemplated was that a tenement house as then known and in use in the city of New York should not be erected upon the property. The erection of a hotel was not prohibited, nor was the use of the property restricted to dwelling houses so constructed that one dwelling should be under each roof. The restriction was confined to one particular residential use, viz., a tenement house. The fact that hotels, boarding houses or houses of that character, which were then common in New York, were not prohibited would seem to show that the parties did not intend to restrict the premises to residences of a particular kind; what was contemplated was that the building of a tenement house as then understood in New York should not be allowed, but the modern apartment house is a building entirely distinct from what was then understood as a tenement house." Those views resulted from the construction given to the covenant itself; but the case came before us in the form of a controversy submitted upon an agreed statement of facts, and there were in that statement conces-

sions of fact which aided in the interpretation of the covenant and which, to some extent, affected the decision of the court; but in the present case there is evidence of facts of the same character as those appearing and which were regarded as important in the *White* case. That case is authority for the conclusion that the restrictive covenant now under consideration against tenement houses is not to be construed as relating to such first-class apartment houses as the defendant has erected upon her premises; and it is also authority for the proposition that the definition of a tenement house as contained in chapter 908 of the Laws of 1867 does not apply in this case, for that definition of a tenement house is restricted to that particular act.

The recent case of *Levy v. Schreyer* (177 N. Y. 293) is supposed to be in conflict with these views; but we do not so regard it. There was something more in the covenant there than a restriction upon the grantee's right to erect or permit to be "erected or carried on" upon the premises a tenement house. There was also the positive covenant that the grantee would not erect any houses except private dwellings thereon; and that restriction is absent from this covenant. It was regarded as very material by the Court of Appeals. In that case the trial court found that the building erected was not a private residence or private dwelling, and it was upon all of the restrictive covenants that the Court of Appeals held that the plaintiff was entitled to an injunction against the use of the building as a tenement house or for any other purpose than that of a private dwelling or residence. So far as the present case is concerned, we have only the restriction against a tenement house to consider, and we do not regard *Levy v. Schreyer* (*supra*) as deciding that such costly, commodious and attractive first-class apartment houses as have been erected by the defendant are to be regarded as tenement houses within the intention or meaning of the parties when title was taken under the deeds from Harsen's executors, which contained the restrictive covenant.

The judgment should be affirmed, with costs.

O'BRIEN and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., and McLAUGHLIN, J., dissented.

Judgment affirmed, with costs.

WILSON R. HUNTER, Respondent, v. WILLIAM FISS, Appellant.

Counterclaim authorized by subdivision 2 of section 502 of the Code of Civil Procedure — if not replied to, the defendant may take judgment — form of such judgment.

Where the defendant in an action upon a promissory note sets up several counterclaims pursuant to subdivision 2 of section 502 of the Code of Civil Procedure, which provides, "if the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand existing against a person who assigned or transferred it after it became due, *must be allowed as a counterclaim* to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him," and the plaintiff does not reply to such counterclaims, the defendant may, under section 515 of the Code of Civil Procedure, take such proper judgment as he may be entitled to by reason of a failure to reply. There is no distinction, regarding the necessity of a reply, between a counterclaim under section 502 of the Code of Civil Procedure and any other counterclaim.

In such a case, if the plaintiff neglects to reply, the defendant is entitled to a judgment establishing the rights of the parties under the pleadings, but not to an absolute dismissal of the complaint, as that would result in a judgment on the merits destroying the defendant's liability on the promissory note and yet leaving all the counterclaims open to enforcement against the plaintiff's assignor.

APPEAL by the defendant, William Fiss, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 2d day of December, 1903, denying the defendant's motion "for judgment dismissing the plaintiff's complaint with costs upon the counterclaims contained in the defendant's answer herein, or for such other and further relief as to the court may seem proper."

August Becker, for the appellant.

John W. Ingram, for the respondent.

PATTERSON, J.:

The question presented on this appeal arises upon a motion made by the defendant for judgment upon matters set up as counterclaims contained in the defendant's answer, and which as counterclaims were not replied to. It was a special motion made under the provisions of

section 515 of the Code of Civil Procedure, by which it is enacted that "if the plaintiff fails to reply or demur to the counterclaim, the defendant may apply, upon notice, for judgment thereupon, and if the case requires it, a reference may be ordered or a writ of inquiry may be issued as prescribed in chapter eleventh of this act, where the plaintiff applies for judgment."

The defendant's application was denied, on the ground, apparently, that all that he sought was a dismissal of the plaintiff's complaint. The action is upon a promissory note for \$1,000, made by the defendant, payable to H. N. Vedder. The complaint alleges the delivery of this note to Vedder and that prior to the commencement of the action it was assigned and transferred to the plaintiff. Although not appearing by the complaint in so many words, it is conceded that the note was assigned and transferred to the plaintiff after its maturity. Such being the fact, it was open to the defendant to set up by way of counterclaim indebtedness of the assignor of the note to him, the defendant, to an extent sufficient to extinguish the claim arising on the cause of action set out in the complaint. It is provided by subdivision 2 of section 502 of the Code of Civil Procedure that "if the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand, existing against a person who assigned or transferred it after it became due, *must be allowed as a counterclaim* to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him." Under this permissive provision of the Code the defendant set up several counterclaims, each of which on its face is good as against the assignor of the note at the time such assignor held it. It is idle to speculate as to the status of these counterclaims, for we are not required to go beyond the terms of subdivision 2 of section 502 to ascertain that. It is specifically required that the demand existing against the assignor be *allowed as a counterclaim*.

A demand that may be set up under that section acquires *ex vi termini* the status of a counterclaim. It is to be pleaded as such; could not be allowed unless it were so pleaded, and it necessarily follows that if it is properly pleaded as a counterclaim, it must be replied to or the defendant may take such proper judgment as he

may be entitled to by reason of a failure to reply. There is no distinction between a counterclaim under this section of the Code and any other counterclaim. There is but one rule of pleading applying to counterclaims.

If this is the correct view, it follows that the defendant was entitled to judgment on the counterclaims, not to an absolute dismissal of the complaint, but to a proper judgment, one which would establish the rights of the parties under the pleadings. The learned judge below denied the motion on the ground that the defendant was not entitled to an absolute dismissal of the complaint. He was right in so holding, but the notice of motion served by the defendant was sufficient to entitle him to a proper judgment on the pleadings. The motion was made "for judgment dismissing the plaintiff's complaint, with costs, upon the counterclaims contained in the defendant's answer herein, or for such other and further relief as to the court may seem proper." That notice was broad enough to afford the defendant any affirmative relief to which he was entitled. Under the terms of this notice of motion the defendant should have been allowed to go on and take that proper judgment. He was not entitled to an absolute dismissal of the complaint because that would have resulted in a judgment on the merits, destroying the defendant's liability on the promissory note and yet leaving all the counterclaims open to enforcement against the plaintiff's assignor.

We think, therefore, the order should be reversed, with ten dollars cost and disbursements of appeal, and, inasmuch as a proper judgment must be framed, the motion should be remitted to the Special Term for further consideration.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements of appeal, and motion remitted to Special Term for further consideration.

GERARDINE H. HICKOK, Respondent, v. ELIZABETH M. BUNTING and JENNIE R. B. MOORE, as Executrices, etc., of ELLA F. BUNTING, Deceased, Appellants.

What instrument is a promissory note — when, although it recites a consideration, not creating a legal obligation, a legal consideration will be presumed in support thereof.

Gerardine H. Hickok brought an action against the executrices of Ella F. Bunting upon the following instrument:

“NEW YORK, December —, 1903.

“Having been cause of a money loss to my friend, Gerardine H. Hickok, I have given her three thousand dollars. I hold this amount in trust for her, and one year after date or thereafter, on demand, I promise to pay to the order of Gerardine H. Hickok, her heirs or assigns, Three thousand dollars with interest.

“ELLA F. BUNTING,

1.16, '04.

“216 East 12th St., N. Y.”

The plaintiff rested after proving the signature to the instrument, the amount of interest due thereon, and offering the instrument in evidence. The defendants offered no evidence.

Held, that the plaintiff had made out a *prima facie* case, and that the court properly directed a verdict in her favor;

That the instrument was a valid promissory note, and that, as it did not appear upon the face thereof that there was no consideration for it, or only an invalid consideration, it would be presumed that it was supported by a valid consideration.

APPEAL by the defendants, Elizabeth M. Bunting and another, as executrices, etc., of Ella F. Bunting, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 12th day of October, 1903, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 22d day of October, 1903, denying the defendants' motion for a new trial made upon the minutes.

Herbert Parsons, for the appellants.

Alfred B. Cruikshank, for the respondent.

O'BRIEN, J.:

This case has already been before this court (*Hickok v. Bunting*, 67 App. Div. 560). The action is upon an instrument in the nature of a promissory note, a copy of which is as follows:

"NEW YORK, *December* —, 1893.

"Having been cause of a money loss to my friend, Gerardine H. Hickok, I have given her three thousand dollars. I hold this amount in trust for her, and one year after date or thereafter, on demand, I promise to pay to the order of Gerardine H. Hickok, her heirs or assigns, Three thousand dollars with interest.

"ELLA F. BUNTING,
1.16, '94.

"216 East 12th St., N. Y."

Upon the former trial, after the plaintiff had proved the signature and introduced the note in evidence and given some testimony in support of its validity, the defendants on their part offered evidence which it was thought by this court threw doubt upon the delivery of the note and raised the question as to whether or not there was consideration therefor. For these reasons a judgment directed for the plaintiff from which the defendants appealed, was reversed, this court holding that there were presented questions of fact which should have been submitted to the jury.

Upon the new trial the plaintiff contented herself with proving the signature and the amount of interest due and, relying upon the presumption of delivery from the possession of the note, offered it in evidence and rested. The defendants moved to dismiss the complaint, and to the denial of their motion excepted, and then in turn rested; and the plaintiff having moved for a direction in her favor, that motion was granted and to this ruling the defendants excepted, so that it is these exceptions to the refusal to dismiss the complaint and to the direction of a verdict for the plaintiff which are now urged upon our attention.

Had this been a negotiable promissory note in the usual form, we do not think it would be seriously contended that upon such a record as is here presented a direction of a verdict would not have been proper. The defendants contend, however, that though this instrument be regarded as a promissory note, it is of an unusual kind, and that all the parts of the instrument must be read together, and that inasmuch as on its face it purports to state a consideration which is neither a legal nor a valid consideration, the one expressed takes the place of the valid consideration which, if such a statement had not appeared upon the face of the note, would be presumed.

For this proposition the appellants claim support by taking certain language in our former opinion away from its context and considering it apart from the subject in the discussion of which it was used.

The portion from which the appellants get most comfort is the following: "The recital is that the deceased had been the cause of a money loss. This standing alone would be insufficient to show the existence of a present legal consideration or that an enforceable obligation had ever existed. * * * If we eliminate the declaration of the plaintiff that the deceased owed her a debt, then we have nothing in the oral testimony or in the recital of the instrument to establish that there at any time existed a legal enforceable obligation against the deceased in favor of the plaintiff or that the facts were of such a character as would estop the deceased from denying her legal obligation for the payment of the money." This language was not intended to be nor was it confined to stating that the recital which preceded the promissory portion of the instrument was conclusive either upon the plaintiff or the defendant. What the court was discussing was whether upon all the evidence (that presented on the face of the instrument, together with such corroborating evidence as the plaintiff adduced upon that subject, as offset by the testimony offered by the defendants) the situation was one which, upon the question of consideration, required that their case should be submitted to the jury (which was the conclusion we reached) or whether the trial judge was right on the first trial in directing a verdict. As we have pointed out, upon the present trial there was practically no evidence given except such as was needed to entitle the paper to be admitted in evidence. That the paper was a promissory note was expressly held upon the former appeal and in the following language:

"Following the declaration of trust the instrument contains a promise to pay, one year after date or on demand, *to the order of* the plaintiff, her heirs or assigns, \$3,000 with interest. There are no words of limitation of this promise in the language preceding it. The promise to pay is express and is to the order of the payee, and it contains every essential element to constitute a promissory note as defined by the Negotiable Instruments Law (Laws of 1897, chap. 612, § 320) and by authority. (*Carnwright v. Gray*, 127 N. Y. 92.)"

The contention of the appellants may be well founded that, if on the face of the instrument it conclusively appeared that there was *no* consideration, or that there was an *invalid* consideration, then the instrument could not be enforced. For the reason, however, that neither of these appeared upon the face of the instrument, we think that, taking the legal presumption which arises in favor of there having been a valid consideration for the note, and in the absence of any evidence to rebut it, a *prima facie* case was made out.

In *Hegeman v. Moon* (131 N. Y. 462) the deceased made an instrument as follows: "One year after my death I hereby direct my executors to pay to Joseph Hegeman, his heirs, executors or assigns, the sum of nineteen hundred and seventy-six dollars and ninety cents, being the balance due him for cash advanced at various times by him to Adrian Hegeman, my son, and others, as per statement rendered by him this day, without interest." In that case as in this the inference was sought to be drawn from the language employed in the note that there was no legal consideration, but the court said: "The addition of the words that the money is due the payee 'for cash advanced at various times by him to Adrian Hegeman, my son, and others, as per statement rendered by him this day,' does not alter the implication that the money is due the payee from the maker. It simply states the origin of the indebtedness of the maker. It was not for money advanced directly to her, but to her son and others. There is nothing inconsistent with her indebtedness to the payee in the fact of this acknowledged advance of the money to the maker's son. An original indebtedness may have arisen against the maker by the payee advancing at the maker's request moneys to her son. And when she says that a certain amount is due the payee and signs the statement, with the addition of the origin of the indebtedness, the implication is neither forced nor unnatural that she means that the amount is due from her, or else she would not have signed the paper."

We think the respondent is right in asserting that the principle of the *Hegeman* case and the one at bar are precisely the same, and that, as in the former the court was bound to presume in support of the obligation that the moneys advanced to a third person by the payee were advanced at the maker's request and thus constituted a legal obligation on the part of the maker, so, in the present case,

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the court is bound to assume that the money loss which the plaintiff, the payee, had suffered at the hands of the maker was legally chargeable to the maker and constituted a legal liability on her part.

Our conclusion, therefore, is that the disposition made by the learned trial judge was right and that the judgment appealed from should be affirmed, with costs.

VAN BRUNT, P. J., INGRAHAM, McLAUGHLIN and HATCH, JJ., concurred.

Judgment affirmed, with costs.

JOSEPH G. HOUGHTON, as Trustee in Bankruptcy of the Estate of ALFRED T. SIMM, Bankrupt, Respondent, v. MAX STINER, Appellant.

Trustee in bankruptcy — his remedy to recover property, transferred by the bankrupt to a creditor in violation of the Bankruptcy Law, is in equity.

With respect to the property transferred by a bankrupt to a creditor in violation of subdivision b of section 60 of the Bankruptcy Law, providing, "If a bankrupt shall have given a preference within four months before the filing of a petition * * * and the person receiving it * * * shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person," the trustee in bankruptcy is not, by the mere force of his appointment, invested with the legal title or the right to the possession of the property so transferred, but is permitted to regard the transfer as voidable at his election.

The remedy of the trustee with respect to such property is by an action in equity and he is not obliged to resort to an action at law.

Quare, whether he could maintain an action at law.

APPEAL by the defendant, Max Stiner, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 31st day of July, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the defendant's demurrer to the plaintiff's complaint.

William J. Barr, for the appellant.

Walter Large, for the respondent.

O'BRIEN, J. :

The action is brought by a trustee in bankruptcy to recover the value of a stock of goods alleged to have been transferred to the defendant, a creditor, by the bankrupt, when insolvent in fact, and known by the bankrupt and the defendant to be so, within four months of the filing of the petition in bankruptcy, the purpose and intent of the transfer being to give an illegal preference. The defendant demurred to the complaint, and from the interlocutory judgment overruling the demurrer he appeals.

In form, taking the allegations of the complaint and the prayer for relief, the plaintiff brings this action in equity for an accounting ; and the specific ground of the demurrer is that the plaintiff has an adequate remedy at law and that an action in equity upon the facts cannot be maintained. The precise question, therefore, is whether a trustee in bankruptcy, who, by appropriate allegations and prayer for relief, seeks his remedy, can maintain an action in that form or, as contended by the defendant, is exclusively confined to an action at law.

Subdivision b of section 60 of the Bankruptcy Law (30 U. S. Stat. at Large, 562), so far as material, is as follows : " If a bankrupt shall have given a preference within four months before the filing of a petition * * * and the person receiving it * * * shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." There is nothing in this language, nor is there any provision of the Bankruptcy Law which prescribes the remedy or the form of action that a trustee is authorized to maintain to enforce the rights invested in him by the section quoted.

If we are to be controlled by the weight of precedent, we might multiply indefinitely the citation of cases brought in equity wherein relief such as is here sought was accorded. (*Schreyer v. Citizens' Nat. Bank*, 74 App. Div. 478 ; *Pearsall v. Nassau Nat. Bank*, Id. 89 ; *Bardes v. Hawarden Bank*, 178 U. S. 524 ; *Jones v. Schermerhorn*, 53 App. Div. 494 ; *Stackhouse v. Holden*, 66 id. 423 ; *Perry v. Booth*, 67 id. 235.)

On the other hand, we have in support of the appellant's contention the case of *Garrison v. Markley* (10 Fed. Cas. No. 5,256)

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which was an action brought in Michigan under the act of 1867. With respect to that case, however, two criticisms are justified. The first is that under the act of 1867 transfers made within four months were absolutely void (See 14 U. S. Stat. at Large, 534, § 35), whereas, under the present Bankruptcy Law, it will be noticed that they are only voidable. The second criticism is that we have no means of determining from that case itself whether the law governing the transfer of title and possession of property and the forms of action that may be resorted to are or are not the same as in our own jurisdiction or that of Connecticut, in which latter State it is alleged the property here in question was transferred.

If, however, disregarding these distinctions, it should be held that the Michigan case is directly in point, then in view of the uniformity with which a contrary practice has been followed in our own jurisdiction, we would not be justified because of an old decision which does not seem to have been applied or followed under the present Bankruptcy Law, in departing from the practice which has been established in our own jurisdiction. Aside, however, from precedents or cases, we think that were this an original proposition, the right to maintain in equity such an action as this can be sustained by good and sufficient reasons.

The transfer made by the debtor to the creditor was entirely valid when made and the title to the property passed to the creditor together with the right to possession. We do not understand that an action at law could be maintained in trover or replevin by one who neither had the title to the property nor the right to possession. It is true that where the trustee elects to avoid the transfer because giving a preference he is entitled to recover the property which has been transferred or its value; but this is quite distinct and different from *divesting* the creditor of the title and right to possession by the fact, merely, that the trustee in bankruptcy elects to rescind the transaction. When such election is signified, either by demand or the bringing of an action in equity for an accounting, the creditor then stands in the position of one who holds the title and the right of possession to the property, or its value if sold, as *quasi* trustee for all the creditors and as such he can be compelled to *account* in equity to the one entitled on behalf of the creditors to the property.

Another consideration as bearing upon the form of action lies in the fact that it may well be that the transfer from the debtor to the creditor has been evidenced by a deed in writing if it relates to real estate or by a bill of sale in writing if it has reference to personal property. And as these instruments, valid when made, must necessarily be destroyed and set aside, a phase of litigation is presented of which equity has usually assumed jurisdiction. In other words, the muniments of title under which the creditor holds the title to the property may be an obstacle in the way of the trustee in bankruptcy reaching it, and to that end it may in form be necessary, if not in fact, to have the written muniments of title held to be void. Such relief is granted in an action in equity and not in one at law.

We are not unmindful of the fact that there is no element of fraud in this form of action and that the theory upon which relief is accorded is not that the creditor has done anything wrongful in obtaining payment for his debt, because that he could legally do; but the right is given to the trustee in bankruptcy by statute to set aside such payment for the purpose of preventing a preference to any particular creditor within four months of the filing of the petition or of the adjudication in bankruptcy.

Apart, however, from the question of fraud, thinking as we do that the trustee with respect to property so transferred to a creditor is not by the mere force of his appointment invested with the legal title or the right to possession of the property, but that he is permitted in the proper action to regard the transfer as voidable at his election, it follows, we think, that the mere fact of electing does not destroy the rules affecting title, ownership or possession, and, as under them the title and right to possession is in the creditor — until such time as he either voluntarily surrenders the same to the trustee in bankruptcy or is deprived thereof by a valid adjudication — the trustee in bankruptcy is not, at the outset, in a position to maintain an action at law either in trover or in replevin. If neither of these actions will lie — and they are the only ones at law that can be suggested — then seemingly the remedy of the trustee would be in equity.

We have been referred neither to principle nor binding authority which should, after the long and uniform practice to which we have

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referred, incline us to decide for a change; and we think that the disposition made by the learned judge at Special Term in overruling the demurrer was right and that the judgment appealed from should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

In the Matter of the Application of PETER SPIES, Appellant, for a Writ of Habeas Corpus.

FRANCIS X. BUTLER, as Receiver, etc., of PETER SPIES and MARGARET K. SPIES, Respondents.

Receiver in a matrimonial action — effect of the order appointing him not requiring him to give a bond — it does not excuse the husband for refusing to deliver his property to the receiver.

Section 715 of the Code of Civil Procedure, providing, "a receiver appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the People, with at least two sufficient sureties, in a penalty fixed by the court, judge or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver," applies to a receiver appointed in a matrimonial action.

An order appointing a receiver in a matrimonial action which does not require him to give a bond is not void, but merely voidable.

The husband cannot, because of the omission of this provision from the order appointing the receiver, legally refuse to deliver his property to the receiver upon demand; his remedy is by an appeal from the order.

McLAUGHLIN, J., dissented.

APPEAL by the relator, Peter Spies, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of November, 1903, dismissing a writ of habeas corpus theretofore issued herein.

Smith Lent, for the appellant.

Charles W. Lefler, for the respondents.

O'BRIEN, J. :

In an action brought against the relator by his wife for a limited divorce, such proceedings were finally had that a receiver of all the

real and personal property of the relator was appointed, who, after his appointment, demanded the assignment to him of certain patents and patent rights. With this demand the relator refused to comply and was thereafter, for such refusal, adjudged in contempt of court. A warrant of commitment was issued to the sheriff who arrested the relator and imprisoned him, and it is by virtue of such commitment that he is now confined in the county jail. In the order appointing the receiver there was no provision for the giving of a bond, and, so far as appears, no bond has ever been given by the receiver, and the question is presented upon this appeal whether the receiver had power to act until he had been required to and did give and file a bond.

The relator contends that as it appeared that the receiver had not filed any bond at the time he made demand for the delivery of the property, he was not entitled to make such demand, and, therefore, the refusal of the relator was justifiable and he could not be held guilty of contempt for such refusal, and that his imprisonment by reason thereof is illegal.

The receiver was appointed under section 1772 of the Code of Civil Procedure, which contains the provisions for enforcing a judgment rendered in a matrimonial action, and, among other things, provides that on the refusal of the husband to pay the money or give the security required under the judgment, the court "may cause his personal property and the rents and profits of his real property to be sequestered and may appoint a receiver thereof." The section, it will be noticed, does not in terms require the receiver thus appointed to give a bond, but by section 715 of the Code it is provided that "a receiver appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the People, with at least two sufficient sureties, in a penalty fixed by the court, judge or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver."

The theory undoubtedly adopted by the learned judges making the orders was, that section 715 did not apply to a matrimonial action. This subject of the giving of a bond was one over which they had undoubted jurisdiction and which it was for them to decide, and for an error in the decision made the remedy would be

by appeal. We agree with the relator that section 715 of the Code, which is the general provision relating to receivers, is controlling in matrimonial as well as in other actions or proceedings wherein no other or different provision is made by law. The error, however, into which the court fell in not requiring a bond to be given did not render the order under which the receiver was appointed void, though it was voidable.

Holmes v. McDowell (15 Hun, 585; *affd.*, 76 N. Y. 596) is somewhat analogous in principle. That was an action to dissolve an insolvent partnership, wherein a receiver was appointed under an order requiring a bond to be given with one surety only, instead of two, as required by section 715 of the Code, and in a contest between judgment creditors claiming liens upon the partnership property as against the receiver, one of the main grounds relied upon was that the order, having been made upon insufficient sureties, was void, and that the receiver obtained no title as against them. This contention was not sustained, it being held that such order was not void, but that the court might at Special Term amend it so as to require a bond with two sureties to be given.

That case is not directly in point, however, because there the order itself was assailed, whereas here the order of appointment is not directly attacked, but the contention is that the receiver was not qualified or entitled legally under it to make the demand which he did until he had given the bond required by section 715 of the Code, and hence that the relator was warranted in refusing to comply. This, however, as we have endeavored to point out, was a question for the court to determine, and determining it erroneously did not defeat the title or right of the receiver, nor was it for the relator to determine for himself whether or not the court had correctly decided the question of requiring the receiver to give a bond, his remedy being to appeal.

We think that the order made in this proceeding adjudging the relator guilty of contempt was right, and that the order appealed from dismissing the writ of habeas corpus should be affirmed.

VAN BRUNT, P. J., INGRAHAM and HATCH, JJ., concurred;
McLAUGHLIN, J., dissented.

McLAUGHLIN, J. (dissenting) :

I am unable to agree to an affirmance of this order. The receiver was appointed under section 1772 of the Code of Civil Procedure, but his appointment, so far as a bond is concerned, is controlled by section 715 of the Code, which provides: "A receiver appointed in an action or special proceeding, *must*, before entering upon his duties, execute and file with the proper clerk, a bond to the People, with at least two sufficient sureties, in a penalty fixed by the court, judge or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver * * *."

It may be conceded that the receiver's appointment was regular, in the sense that it was not void, but it was so far incomplete—in that no provision had been made for the giving of a bond—that the receiver could not perform any act as such. To hold otherwise is to nullify so much of section 715 of the Code as provides that a receiver "must, before entering upon his duties, execute and file with the proper clerk, a bond." The receiver not being in a position to make the demand, it was not a contempt of court for the relator to refuse to comply with it. It seems to me to be quite a novel proposition that one commits contempt of court in not turning over all of his property to a person not authorized to receive it, simply because an unauthorized demand has been made therefor.

I think the order appealed from should be reversed and the motion to discharge the relator granted.

Order affirmed.

MYRON T. PRITCHARD, as Executor, etc., of CHARLES H. HAYNES,
Deceased, Respondent, v. THE EDISON ELECTRIC ILLUMINATING
COMPANY OF NEW YORK, Appellant.

Electric plant — when it is a nuisance in a city — character of the neighborhood considered — obstruction of the street by ashes — that it could not be otherwise operated is no defense — measure of damages of the lessee of an adjoining hotel — admissibility of a petition for an inspection by the board of health — consolidation of two actions — objection that service of a new complaint and answer was not ordered — when waived.

Evidence that the operation of a plant for the generation of electricity, constructed by a private corporation in a residential district of the city of New York, is attended by vibrations, noise, smoke, dirt and bad odors, which invade

and injuriously affect the use and enjoyment of a hotel adjoining said plant, will sustain a finding that the plant constitutes a nuisance.

Any obstruction of the street in front of the hotel by ashes or dirt from the plant may be properly considered by the jury.

The fact that the plant could not be operated in the locality without creating a nuisance constitutes no defense to the corporation.

A lessee of the hotel is entitled to recover from the corporation the damages sustained by him during the period that he is in possession.

The measure of the lessee's damages is the injury to the usable value of the hotel, which consists of the diminution in the room rent of the hotel and the loss in consequence of the inability of the lessee to supply refreshments to those whose presence was prevented by the nuisance.

It is not improper for the court to charge that the damages which the lessee could recover "are to be limited to the actual loss of profits, such as you find from the evidence were caused to be lost through the defendant's acts in the use and operation of its power station," where it appears that no profits were alleged or proved, except such as were directly connected with the room rent and the restaurant.

The court may properly refuse to charge that "the measure of damages applicable to a case of this kind is the actual diminution in rental value by reason of the defendant's acts," as such request limited the lessee to a recovery of the actual diminution of rental value instead of the diminution in the usable value.

The court may properly refuse to charge that "loss of income from business is not provable as an element of damage."

Where an inspector of the board of health, who examined the electric plant and the hotel, is called as a witness by the lessee and details the result of his examination, and the defendant brings out upon his cross-examination that the inspection was based upon a petition or complaint to the health department, the admission of the petition in evidence on the request of the plaintiff's counsel does not constitute reversible error, where, as stated by the court, the petition was admitted, simply for the purpose of showing what it was, and not as proof of any of the facts contained therein.

In determining whether the use of real property is so unwarrantable and unreasonable with respect to adjacent property as to constitute a nuisance, the character of the neighborhood should be taken into consideration.

Semble, that where an order consolidating two actions does not direct the service of a new complaint and answer, the defendant must raise that objection by an appeal from the order and cannot raise it for the first time upon the trial of the consolidated action.

APPEAL by the defendant, The Edison Electric Illuminating Company of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 5th day of June, 1903, upon the verdict of a

jury for \$16,000, and also from an order entered in said clerk's office on the 4th day of June, 1903, denying the defendant's motion for a new trial made upon the minutes.

Henry J. Hemmens, for the appellant.

Frank M. Hardenbrook, for the respondent.

INGRAHAM, J. :

The plaintiff's testator commenced this action, alleging that he was the lessee of certain premises in the city of New York under a lease dated April 19, 1890, for the term of five years, which expired on the 1st day of May, 1895, and which was renewed by a lease dated April 19, 1895, for a further term of five years ending on the 1st day of May, 1900; that there was maintained by the plaintiff upon said premises during that period a hotel and Turkish bathing establishment; that since the leasing and occupation of said premises by the plaintiff the defendant has acquired certain property adjoining the hotel occupied by the plaintiff, and caused to be built upon said property a large building with numerous steam boilers, engines and dynamo electric machines, for the purpose of generating electricity to be supplied by the defendant to the general public for lighting purposes; that in June, 1890, the defendant commenced to operate said machinery, and that the operation of the machinery and building upon the defendant's property is a nuisance which has caused the plaintiff injury to his damage in the sum of \$70,000; and the plaintiff asked for an injunction to restrain the defendant from continuing such nuisance and for his damages.

The defendant interposed an answer, and subsequent thereto the plaintiff's testator died, and the action was continued in favor of this plaintiff as executor of the plaintiff. This order was entered on the 3d day of November, 1902. On May 12, 1900, the plaintiff's testator commenced a second action realleging the same facts, alleging the continuance of the nuisance from the time of the beginning of the first action, and asking to recover the sum of \$10,000 damages therefor. To this complaint the defendant interposed an answer, and on the death of the plaintiff in that action the second action was also revived in favor of this plaintiff as his executor. Subsequently, on the 14th day of January, 1903, upon

motion of the plaintiff in the two actions, an order was made at Special Term transferring the action in equity "to the law side of this court for the trial of issues of fact by a jury," and further consolidating the two actions, "and that the said actions be tried as one action in said court for the trial of issues of fact by a jury, and that the trial of said consolidated action proceed in the regular order at such time as said action No. 2017 upon the law side of the said court is reached for trial without any new note of issues being filed or a new notice of trial being served." No appeal was taken from that order, and no new complaint was required to be served.

Upon the consolidation of these two actions as an action at law, the effect was to waive the equitable relief asked for in the first action and to make the consolidated action one to recover the damages caused by the maintenance of the nuisance, to be tried upon the allegations of the two complaints relevant to such an action at law for the recovery of damages. Upon the cause coming on for trial before a jury the court called the attention of counsel to the condition of the pleadings, there being two complaints in one action, and then the defendant stated as an objection that there was no pleading before the court which raised the issues under the order of consolidation, and, claiming that the defendant should have an opportunity to answer, moved that the cause be sent back to the general calendar so that a complaint could be served. This motion the court denied, to which the defendant excepted. The defendant does not rely upon this exception on this appeal, and it would seem that the defendant had waived the objection by not appealing from the order of the Special Term which directly consolidated the equity action with the common-law action and directed that they should subsequently proceed as one action.

The total damage demanded by the plaintiff in the two actions was \$80,000. The jury found a verdict for the plaintiff for \$16,000. The plaintiff introduced evidence tending to show that the operation of the machinery in the defendant's building produced a vibration and shaking of the building occupied by the plaintiff; that dirt and cinders came from the defendant's building into the rooms of plaintiff's building when the windows were open; that there was much noise, smoke, dirt and bad odors from the defendant's building which invaded the plaintiff's premises, and that these

conditions had increased as the defendant's business increased and more machinery was operated. There was also evidence of a decline in the rental value of the premises since this use by the defendant of its property; that about the year 1893 the income derived from the rental of rooms in plaintiff's hotel began to decrease, and that during the rest of the time up to the trial the income received from the rent of rooms was subsequently decreased from the income received before the establishment of the defendant's business. The defendant introduced evidence tending to show that the vibration caused by its machinery was very slight; that there was no smoke or dirt or soot from the defendant's building which penetrated the plaintiff's premises, and that the decrease in the rental value of the premises in the neighborhood was caused by a financial panic which came in 1893, and other causes not connected with the occupation of the defendant's building.

Upon this evidence the trial court submitted to the jury the question as to whether the operation of the defendant's station was a nuisance, "that is, whether it was an unreasonable interference with the rights of this neighboring householder in the ordinary enjoyment of his property," and instructed the jury that "ordinarily a person may use his own premises as he pleases and for any lawful business, but his use must be a reasonable one in order that he may not injure his neighbor, and if, through some unusual use of the premises, actual discomfort and annoyance results to his neighbors, greater than the ordinary and reasonable use of the premises would cause, the person who chooses to use his property in this way must pay his neighbor for the injury which he does the latter." And upon the subject of damages the trial court charged: "If the defendant's power station as operated was a nuisance and lessened the profits of this hotel, the damages which the plaintiff may recover are to be limited to the actual loss of profits, such as you find from the evidence were caused to be lost through the defendant's acts in the use and operation of its power station;" that "any award to be made to the plaintiff should be limited to so much of the loss as was occasioned by the acts of the defendant." There was no exception to the charge, but the defendant submitted thirty-seven requests to charge, one of which the court charged and refused the others, to which the defendant excepted.

The plaintiff's testimony showed a decrease in the amount received from room rent in the year 1898, as compared with the year 1897, of about \$10,000 a year, and the jury have found that the total damage sustained by the plaintiff in consequence of the defendant's operation for the period between November 22, 1892, and November 1, 1898, was \$16,000, a little over \$2,600 per year. The defendant strenuously insists that this verdict was against the weight of evidence and that the damages are excessive. That the plaintiff was entitled to recover the damage sustained by him as the lessee of the premises during the period that he was in possession as such lessee is now settled by the Court of Appeals (*Bly v. Edison Electric Illum. Co.*, 172 N. Y. 1), and the substantial questions for the jury were, did the defendant maintain a nuisance, and if so, what were the plaintiff's damages? A nuisance is defined in the *Bly* case as "an unreasonable, unwarrantable or unlawful use of one's own property to the annoyance, inconvenience, discomfort or damage of another," and accepting this definition, we think the evidence justified the jury in finding that the use to which the defendant had put the premises was an unreasonable, unwarrantable or unlawful use, to the annoyance, inconvenience, discomfort or damage of the plaintiff. This building had been in use as a hotel for years before the defendant acquired this property and erected upon it a plant for generating electricity. While supplying the public with electricity, light and power, it was none the less a private corporation organized for private gain, and it voluntarily selected the premises in question upon which to conduct its operations; and the question whether the operation of such a plant would be inconsistent with the general character of the neighborhood and such as to necessarily injure the use to which the adjoining property was put was the serious question in determining whether the use to which the defendant put its property was unwarrantable and unreasonable. There are many parts of New York where a building devoted to such a use would manifestly have no injurious effect upon the adjoining property, and there are many localities where such a use would produce great injury and entirely destroy the value of adjoining property as used by its owners. When the defendant acquired its property in Twenty-eighth street the neighborhood was residential and the owner of property upon this street had no right to there

erect a structure and apply it to a use which was inconsistent with the general use of property in the neighborhood, and which would necessarily cause those owning and in possession of adjoining property an injury; and when the use of property is spoken of as unwarrantable and unreasonable it necessarily relates to the character of the locality in which the property is situated, considering the location and the use to which the neighboring property was put. It requires but little evidence to show that the use to which the defendant devoted this property was one which would necessarily be an annoyance to occupants of adjacent property, and which would seriously affect the usable value of that property to the occupants; and that being so, it would seem to follow that the person devoting his property in such a locality to such a use was maintaining a nuisance. We think, therefore, that the finding of the jury that the defendant was maintaining a nuisance was sustained by the evidence.

The next question is as to the proper measure of damages, and this we have lately had before us in the case of *Bates v. Holbrook* (89 App. Div. 548). We there held that the measure of damages was the injury to the usable value of the property which was caused by the nuisance; that in case of a hotel such usable value could be determined by the decrease in the rent of the rooms and the loss in the business of the hotel, and that this rule is not in violation of the principle that in actions of this character loss of profits is not recoverable. It follows that the plaintiff was entitled to recover, as the injury to the usable value of the property, the diminution in room rent of the hotel and the loss in consequence of the failure to supply refreshments to those whose presence was prevented by the nuisance. This being the rule, it was not improper for the court to charge that the damages which the plaintiff may recover "are to be limited to the actual loss of profits, such as you find from the evidence were caused to be lost through the defendant's acts in the use and operation of its power station." There were no profits alleged or proved except such as were directly connected with the room rent and the restaurant; and the defendant did not except to this charge.

We are then to determine whether the court refused to charge any request upon this subject to which the defendant was entitled. The first request that the court refused upon the question of damages was the seventh, which is that "the measure of damages

applicable to a case of this kind is the actual diminution in rental value by reason of the defendant's acts." This request was plainly erroneous, in that it limited the plaintiff to a recovery of the actual diminution of rental value, instead of to the diminution in the usable value of the property to the plaintiff caused by the nuisance. The defendant also requested the court to charge that "loss of income from business is not provable as an element of damage." This, if we are right as to the measure of damage applicable to such a case, was not correct, and these are the only two requests to charge which bore on the question of damage. There was no error, therefore, in the charge of the learned trial judge or in his refusal to charge upon this question that would justify us in reversing the judgment.

The other requests to charge which were refused we think were all properly refused. The use to which the defendant put this property was no less a nuisance because no care in the operation of the machinery supplied would prevent it from being one. It is not alleged that the defendant negligently conducted its business, or that the machinery was not proper for that purpose, but that the generation of electricity upon these premises by proper machinery carefully used necessarily caused the vibration, dirt, dust, cinders and odors that made the conduct of such a business in such a locality a nuisance; and the jury by their verdict having found that it was such a nuisance, it was no defense to prove that such a business could not have been conducted in such a locality without its being a nuisance.

The other propositions presented do not require discussion, as we are satisfied that the defendant was not entitled to have any of them charged.

There are many exceptions to evidence scattered through this record, some of which are relied upon by the defendant upon this appeal. The most serious is that presented to the admission of a petition to the health department of the city of New York, asking that this defendant's power house be condemned as a public nuisance and removed to such locality as would not be injured thereby. An inspector of the board of health was called as a witness by the plaintiff and testified that he had visited the defendant's power house in West Twenty-sixth street and the plaintiff's hotel in the same street. He testified as to the results of his inspection of the plaintiff's prem-

ises and the other property in the neighborhood. Upon cross-examination he testified in answer to questions by counsel for defendant that he went there in pursuance of a complaint that had been made against the operation of this station; that the complaint was a petition signed by a number of the property owners in the neighborhood, and that he based his report to the board of health upon his own investigation of the premises; that he had the original complaint with him at the time he was examined, which was filed with the board of health, whereupon counsel for the plaintiff asked the witness to produce the petition, and offered it in evidence, which was objected to, the court saying: "I will let the petition in simply for the purpose of showing what it was. * * * Not as proof of any of the facts which the petition itself contained. It is simply as showing you have asked about the petition, and the petition itself is in writing." For this limited purpose it was admitted. I do not think it was incompetent for that purpose. The result of the witness' examination having been detailed by the witness, the defendant brought out the fact that such examination was based upon a petition or complaint which had come to the health department, to investigate which the witness made the examination. The nature of the examination, its thoroughness and the object that the witness had in view in making it, were material for the jury in determining the weight to be given to his evidence, and it was competent for the plaintiff to show just what that complaint was, that the jury could judge of the thoroughness of the examination and the effect to be given to his testimony as to what he discovered. The court carefully limited the admission of this petition for that purpose, and if the defendant had wished to have the jury instructed that they were not to consider that petition as any proof of the facts therein stated, it should have made a request for such an instruction when the case was finally submitted.

The defendant also objects to evidence as to the use of the street by the defendant; but I think this evidence, in the connection in which it was given, was not incompetent, and the court expressly charged the jury at the request of the defendant that no damages could be awarded to the plaintiff by reason of the obstruction of the sidewalk or road temporarily for business purposes, or for the purpose of taking machinery or appliances into the defendant's build-

ing. The defendant, maintaining a nuisance, was liable for the damage that the nuisance caused, and any obstruction of the street by the defendant by ashes or dirt in front of the plaintiff's premises was properly to be considered by the jury. There was no evidence given to which objection was made to any use of the street in front of the defendant's premises by the defendant. The other objections I do not think at all material or that they present any error which would justify us in reversing the judgment.

Upon the whole case, I think the testimony fairly sustained the verdict of the jury, and that the judgment and order should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Judgment and order affirmed, with costs.

THE IDEAL WRENCH COMPANY, Respondent, v. THE GARVIN
MACHINE COMPANY, Appellant.

Contract to manufacture and deliver goods "in every way equal to a model" — there is no warranty which survives acceptance — measure of damages for a failure to deliver the goods contracted for — the difference between their market value and the contract price; between their value to the vendee and the contract price.

A contract to manufacture and deliver, at a specified price for each one, a number of wrenches to be made in a first class manner in every way equal to a model, constitutes a contract to manufacture and deliver and not a sale by sample, and there is no warranty express or implied which survives the acceptance of the wrenches by the vendee.

If the vendor tenders wrenches inferior in quality to the model submitted, the vendee may refuse to accept them, and recover damages. He cannot, however, accept them and hold the vendor liable in damages because of the inferior quality of the wrenches.

Where the contract provided that the vendee should pay the vendor \$1,500 for making the tools to be used in the manufacture of the wrenches, and that after the completion of the contract such tools should belong to the vendee, if the tools manufactured by the vendor are defective and are not accepted by the vendee, the latter is entitled to recover the \$1,500.

Where the vendee, at the time of the execution of the contract, paid the vendor \$500 to apply upon the last 1,000 of the wrenches, and the same are not delivered, the vendee is entitled to recover that sum.

The measure of damages for a failure on the part of a manufacturer to manufacture and deliver articles which he has agreed to manufacture and deliver, is, where the articles in question have a market value, the difference between the market value and the contract price. If the articles have no market value, the measure of damages is the difference between what would have been the value of the articles to the vendee if they had been delivered and the price which he was to pay therefor.

LAUGHLIN and HATCH, JJ., dissented.

APPEAL by the defendant, The Garvin Machine Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of April, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 29th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

Henry Schoenherr, for the appellant.

Herbert C. Smyth, for the respondent.

INGRAHAM, J. :

The action is to recover damages caused by the breach of a contract for the manufacture by the defendant of a tool called the "Ideal Wrench." Upon an appeal from a judgment entered upon a dismissal of the complaint on a former trial it was held that there was a breach of the contract by the defendant which, in the absence of other proof of damage, authorized the recovery of \$500 deposited with the defendant which was to be applied on the last payment. It was also intimated in the opinion that the plaintiff might be entitled to recover other damages depending on the proof upon a new trial (65 App. Div. 235). Upon the new trial the court submitted the case to the jury, who found a verdict for the plaintiff for \$2,000.

The contract, dated March 6, 1897, was between Walter C. Stokes (plaintiff's assignor) of the first part, and the defendant of the second part. It provided that for and in consideration of the sum of \$500, the receipt of which was acknowledged, the defendant agreed to "build and deliver" 10,000 wrenches known as the "Ideal Pattern," a mould of which was to be furnished Stokes; that 7,500 of said wrenches, blue finish, were to be manufactured at forty cents each, and 2,500 full nickel finish at fifty cents each, pay-

ment for which was to be made within thirty days of delivery, less \$500 advanced, which was to be applied on the last payment. The wrenches were to be made in a first-class manner, in every way equal to that of the model submitted. The complaint alleges the making of this agreement, the assignment of the contract and of all Stokes' rights and claims to damages thereunder to plaintiff; that Stokes and the plaintiff have made all payments and performed all the acts which by the terms of the said contract were to be made and performed by Stokes, but that the defendant corporation has neglected, failed and refused to carry out said contract or to perform the acts therein by it agreed to be performed; that the defendant has failed and refused to build or deliver any wrenches made in a first-class manner, and has failed to build or deliver any wrenches made in every way equal to that of the model, although such model was duly furnished to the defendant; that the defendant failed and refused to deliver any wrenches within a reasonable time, and not until months after the execution of said contract, although frequently and urgently requested to do so; that the defendant, after the month of May, 1897, from time to time and at long intervals, until the month of October, 1897, delivered wrenches in small quantities, amounting in the aggregate to about 2,000 wrenches, and since said month of October, 1897, has failed, refused and neglected to tender or deliver any wrenches meeting the requirements of said contract; that all the wrenches tendered or delivered by the defendant were weak and defective, and neither made in a first-class manner nor equal to that of said model; that large numbers of said wrenches of the number delivered as aforesaid were delivered in turn and distributed by said Stokes or said plaintiff, and broke with ordinary use in the hands of intending purchasers, and were returned by such purchasers to said Stokes or the plaintiff to the great damage and detriment of their business, and the defendant failed to deliver any wrenches, the parts of which were interchangeable, to the great detriment and loss of plaintiff; that by reason thereof and of the unreasonable delay in the delivery of wrenches, the failure to deliver any wrenches in accordance with the contract, the failure and neglect to deliver more than 2,000 wrenches in all, and the failure to make the tools necessary for the manufacture of said wrenches, the defendant has caused damage to Stokes and the plaintiff.

The answer admits the making of the contract; admits that the defendant delivered to the plaintiff about 2,000 wrenches in pursuance thereof, and denies the other allegations of the complaint; and for a separate defense it alleges that after the execution of the contract the plaintiff's assignor requested a modification thereof, wishing all the wrenches to be full nickel wrenches; that said Stokes was there and then informed by said defendant that the defendant had already made up and caused to be cast the said 7,500 wrenches which were to be completed in blue or plain finish, and in order to change the style of finish, and to complete them in full nickel finish instead of the blue finish, as called for by the contract, it would be necessary to grind certain parts of the wrenches so as to receive the nickel plate and that some of the parts of the wrenches would be necessarily somewhat thinner than the sample; that thereupon the said Stokes changed the contract and the said order, and directed the defendant to go on and complete the wrenches so cast, and make them up in full nickel finish instead of the blue finish, or plain finish, as called for by the contract; that the defendant, acting under the said instructions, proceeded to complete the wrenches as directed by Stokes; and that if the wrenches tendered to the plaintiff, and the wrenches so delivered, were different or in any particular varied from the samples as called for by the contract, it was not the fault of the defendant, but was the fault of the said Stokes.

Upon the trial Stokes (plaintiff's assignor) testified that prior to the making of the contract the defendant's president stated that the wrenches called for by the contract would be manufactured and delivered in six to eight weeks, and introduced in evidence a letter from the defendant dated February 5, 1897, in which it was said: "We are in excellent shape to take hold of a job of this character, and can make deliveries in about eight to ten weeks from receipt of order." Subsequently on the 6th of March, 1897, the contract in question was executed and Stokes paid \$500 to the defendant, and subsequently paid to defendant for the tools manufactured by it \$1,500. Stokes further testified that the dates of the delivery of wrenches were May twenty-second, one wrench; May twenty-fourth, eight wrenches; June second, sixty wrenches; that the first delivery in quantity was on August sixth of five hundred and twelve wrenches, and so on down to October when it would seem

that the last delivery of five hundred wrenches was made; that on June seventh there were returned to the defendant twenty-nine wrenches; that no wrenches were received from the defendant after November ninth; that neither the \$500 paid upon the execution of the contract nor the \$1,500 paid by the plaintiff or Stokes to the defendant have ever been repaid; that the plaintiff also paid to the defendant the net sum of \$646 for the wrenches delivered. Upon cross-examination Stokes testified that he had a wooden model of the wrench at the time he went to see the defendant; that he submitted this wooden model to the defendant, who stated that they could improve upon it, and that they subsequently made an improved model, which was approved by Stokes. There was also the testimony of an engineer who tested the wrenches furnished by the defendant under this contract, and who testified to the defects and variations from the model.

There can be no question, I think, but that the verdict of the jury that there was a breach of the contract by the defendant was justified, and the only substantial question is as to the correct measure of damages. This was, I think, a contract to manufacture and deliver, and not a sale by sample. When the contract was made there were no goods in existence, a sample of which was produced and upon which a sale was made. A wooden model was produced by the plaintiff's assignor and submitted to the defendant upon which the contract was made. It was then understood, however, that this model was to be improved upon, and the parties contemplated that the article to be manufactured should correspond with a model to be thereafter manufactured by defendant and approved by the plaintiff's assignor. Such a model was subsequently produced by the defendant and approved, and the defendant proceeded with the execution of the contract based upon this approved model. The case of *Gurney v. Atlantic & G. W. Ry. Co.* (58 N. Y. 358) discusses the rules applicable to a contract of this kind and the rights and obligations of the respective parties. It was there said: "The substance of the arrangement was that Naylor & Co. agreed to procure to be manufactured a quantity of frogs to correspond with the pattern, and deliver the same to the railway company as desired; in other words, it was an executory contract for the manufacture and delivery of certain articles of per-

sonal property of a specified quality and description. It was not strictly a sale by sample. Such a sale contemplates that the goods are *in esse*, that the sample is taken from the bulk, and that the latter is equal in quality to the sample. This is sometimes called an implied warranty, * * * but it is more properly an express warranty. It amounts to an affirmation that the specimen is a fair sample of the bulk of the commodity. * * * The general rule is, when articles are sold upon an executory contract like the one in question, that the delivery and acceptance of the articles after examination, or an opportunity to examine them, is a consent or agreement that the articles correspond with the contract and precludes a recovery for any defects which may exist. * * * The vendee must immediately rescind the contract, and return or offer to return the goods. He cannot retain the property and afterward claim damages by action or recoupment for inferior quality. Such a transaction differs from a sale with warranty in that the stipulated quality is a part of the contract itself, and not collateral to it. In the latter case the vendee is not bound to return the property, but may retain it and sue upon the collateral agreement."

This rule has been recognized in all the subsequent cases. In *Zabriskie v. C. V. R. R. Co.* (131 N. Y. 72) it was said: "In cases of the latter character (executory contracts for the manufacture and sale or delivery of goods of a particular description) where the quality of goods is capable of discovery upon inspection, and where, after full opportunity for such inspection, the goods are accepted and no warranty attends the sale, the vendee is precluded from recovering damages for any variation between the goods delivered and those described in the contract." In *Pierson v. Crooks* (115 N. Y. 539) it is said: "There is no dispute as to the rule of law touching the rights of parties under an executory contract for the future sale and delivery of goods of a specified quality in the absence of express warranty. The quality is a part of the description of the thing agreed to be sold and the vendor is bound to furnish articles corresponding with the description. If he tenders articles of an inferior quality, the purchaser is not bound to accept them. But if he does accept them, he is, in the absence of fraud, deemed to have assented that they correspond with the description, and is concluded from subsequently questioning it. This imposes upon the vendee

the duty of inspection before acceptance, if he desires to save his rights in case the goods are of inferior quality."

This presents, we think, the true rule to be applied in determining the measure of the plaintiff's damages. Here the defendant proceeded in the execution of the contract. It delivered 2,000 out of the 10,000 wrenches which it agreed to manufacture and deliver. A portion of these wrenches was accepted by the plaintiff, and a portion returned to the defendant as not in compliance with the contract. As to the portion accepted there can be no recovery because of the inferior quality of the articles accepted. As to the portion returned by the plaintiff to the defendant as inferior, so far as they have been paid for, the plaintiff would be entitled to recover the amount that he has paid for the ones returned. I cannot find, however, that it appears that plaintiff paid for the wrenches that he returned to the defendant. The plaintiff was also entitled to recover for any damages sustained in consequence of a breach of the contract to manufacture and deliver the 8,000 wrenches that the defendant has failed to deliver. Where the articles to be manufactured and delivered have a market value, the measure of damages for a breach of the contract, where the manufacturer fails to deliver the articles that he has agreed to deliver, is the difference between the market value of the articles to be delivered and the contract price to be paid to the manufacturer. Where, however, there is no market value, the rule of damage is the difference between the value of the articles to the vendee, if they had been delivered, and the price that the plaintiff was to pay therefor, to be ascertained by the jury upon the evidence.

As was said in *Murray v. Stanton* (99 Mass. 345): "When there is 'a market value,' it shows the price at which either party may have relief from the consequences of the default of the other, and, therefore, it properly measures his damages. But when there is no such standard, the damages must be estimated from other means of valuation." In *Parsons v. Sutton* (66 N. Y. 92) Judge EARL says: "The ordinary rule of damage in such case is, as already stated, the difference between the contract price and the market price at the time and place of delivery. When the buyer can go into market and buy the article which the seller has failed to deliver, this is the only rule, as it offers the buyer full indemnity. * * *

If there is no market for the article where it is to be delivered, and

it cannot be had there with reasonable diligence, and the buyer suffers damages because of the seller's failure to deliver, which is the proximate and natural consequence of such failure, such damage can be recovered." In *Booth v. Spuyten Duyvil Rolling Mill Co.* (60 N. Y. 492) the court say: "For a breach of an executory contract to sell and deliver personal property the measure of damages is, ordinarily, the difference between the contract price and the market value of the article at the time and place of delivery; * * *. It is expressly found that there was no market price for the steel caps, and it does not appear that there was any market price for the completed rail. The presumption is from the facts proved that there was not. It was a new article, and the contract was made to bring it into use."

These remarks apply to this contract, and there being no market value of the articles to be manufactured, the plaintiff was entitled to recover such damages as the jury should find it sustained by reason of the failure to deliver the articles agreed to be delivered, based upon the fair value of the articles to the plaintiff, had they been delivered, less the amount that they were to pay the defendant for the articles when manufactured and delivered, and that question was to be submitted to the jury and determined by them upon the evidence. As we held upon the former appeal, the plaintiff was also entitled to recover the \$500 paid upon the execution of the contract, which was to be applied upon the last payment for the wrenches to be manufactured and delivered.

The remaining question is as to the right to recover the amount paid by the plaintiff to the defendant for the tools manufactured by the defendant for the purpose of carrying out the contract. The contract provided that "the tools necessary for making these wrenches, amounting to Fifteen hundred dollars (\$1,500), the party of the first part agrees to settle for on presentation of weekly bills, and full inventory of tools to be furnished by the party of the second part;" and it is conceded that the plaintiff had paid the defendant the \$1,500 for the tools necessary for making these wrenches. Rose, an engineer and mechanic, who represented the plaintiff, testified that a day or two before he was examined he went to the defendant and made a demand for these tools; that the tools were afterwards delivered to him and that these tools were afterwards

examined by an expert for the plaintiff. This expert testified that he was familiar with the proper kind of tools for the making of first-class wrenches of this kind; that he examined the tools furnished by the defendant for the manufacture of these wrenches; that he found that a portion of the cutters were worn and broken, and found other defects in them which he specified; that it was the character of these tools that caused the varying thickness between the top and lower sides of the sleeve of the wrench which constituted one of the defects pointed out by him in the wrenches that had been delivered to the plaintiff; that "the method of making the sleeve, as far as I am able to judge from the tools, was such that with those tools the forming of the space through which the shank passes could not be made uniform, and that is evident by the fact that none of the sleeves are uniform. * * * I found that all the tools that I could apply to the making of any portion of this wrench generally had that defect, that they were not positive, that they were not built in such a way that the same result would be produced on each wrench that was made with those tools. * * * Those tools will not make wrenches like the model sample wrench. There is no other reason, other than those I have given, but the tools are not made in such a way that they will produce a uniform article. It is hit or miss whether the sleeve comes out one way or comes out another way, due to the way the tools are made, and the operation of the tools."

Upon this evidence I think it would be a question for the jury to say whether those tools, as described by this witness, were a compliance with the contract; and if not such a compliance, the plaintiff would then be entitled to recover from the defendant the amount that it had paid for the tools. There had been no acceptance by the plaintiff of the tools that were manufactured for it by the defendant, as the tools were not delivered to the plaintiff until they were demanded, a day or two before the trial, and then merely for the purpose of examination.

This being, we think, the rule of damage, we are now to determine whether in submitting the question to the jury, the court observed these rules, or whether there was error that requires us to reverse the judgment. Upon the question of damages the court charged the jury that "If you find, however, that he (defendant)

has not complied with it (the contract) and that he has failed to perform his contract in the particulars which have been specified, then you come to the question of how much the plaintiff is entitled to recover. He would be entitled to recover first of all the \$500 which he has paid, and which was to be applied as the past payment upon the last thousand of the wrenches to be manufactured. There is one other feature of this case. If you find that these wrenches which were furnished were defective and were not in accordance with the terms of the contract, then the plaintiff is entitled to recover the sum that he has paid for them. He has testified that he paid the sum of \$646, I think, and to the extent that they were depreciated by reason of these defects, he is entitled to recover it back. If you find they were entirely valueless, he is entitled to recover the whole of it. If you do not find that, but find there was some damage, he is entitled to recover such portion of that as you find he has sustained injury. Another feature of it: Under the contract the defendant was to furnish, but the plaintiff was to pay \$1,500 for suitable machinery. This machinery was to be delivered to the plaintiff upon the completion of the contract. After the 10,000 wrenches had been made the machinery was to be delivered and was to belong to the plaintiff. Plaintiff has paid for the machinery \$1,500 and he complains now that it is not the proper machinery for the purpose for which it was manufactured, and he has called your attention to the evidence which he says justifies that claim; that the work itself shows that it was not proper machinery. One witness at least has testified that it was not proper machinery and that it was not such machinery as was proper to manufacture this kind of work. If you find that is so, then the plaintiff is entitled to recover the \$1,500 which he has paid for the machinery. * * * The three elements, as I understand that the plaintiff claims as damages are, first, the \$500 which he paid at the inception of the contract; the \$1,500 for the machinery and the \$646 of the balance which he had paid for the wrenches; the entire payments being \$946, but there being 500 of those wrenches that were retained by the plaintiff upon which there was an allowance of 60 cents each, making the sum of \$300 which would be deducted from the \$946, leaving \$646 as the amount that plaintiff had actually paid."

It was undoubtedly error to charge that the plaintiff was entitled to recover the sum of \$646 if the jury found that the wrenches that had been delivered to the plaintiff were entirely valueless, as the plaintiff, by accepting those wrenches, was precluded from questioning the quality of those delivered and accepted as a compliance with the contract. Upon the evidence the jury would have been justified in finding that the tools were not such as it was contemplated should be manufactured and paid for by the plaintiff, and if that is so, I think the plaintiff was entitled to recover the \$1,500 paid by the plaintiff to the defendant for the tools. After the charge of the court, counsel for the defendant stated: "I desire to except to so much of your honor's charge as states that the plaintiff is entitled to recover damages for the wrenches that he has on hand;" in reply to which the court said, "I will hold that this was a warranty to manufacture according to sample, and that that being so he had a right to reject it at any time;" to which counsel for the defendant said, "I take an exception." As the plaintiff was not entitled to recover for the wrenches that had been delivered and accepted by him, this was error and the verdict cannot be sustained. The learned trial judge fell into this error in consequence of a clause in the opinion on the former appeal in which it was stated: "As we view the contract, the sale was by sample, and there was a warranty that the wrenches would substantially conform to the sample and this warranty survived acceptance." But that that was an inadvertence and is not the true construction of this contract, we think is established by the authorities before cited. It was not intended by the court to hold that this was, strictly speaking, a sale by sample, or that there was any warranty, express or implied, that survived the acceptance of the article to be manufactured by the plaintiff.

Neither the case of *Zabriskie v. C. V. R. R. Co.* (131 N. Y. 72) nor *Brigg v. Hilton* (99 id. 517), cited to sustain that proposition, is applicable to such a contract as that before us. In the *Zabriskie* case the contract was for a certain quality of coal sold and delivered to the defendant under a written contract whereby "the said vendors agreed to sell and deliver to the defendant, during the year ending June 1, 1888, at Norwood, N. Y., 30,000 tons of 'Powelton coal, of same quality and kind as furnished you during the past year,' at \$3 per net ton." It was contended in that case by the

plaintiff that there was no warranty of the quality of the coal, and that, by its acceptance, the defendant had precluded itself from claiming damages for a breach of contract. In answer to that claim the court said: "A satisfactory answer to this claim appears in the fact that it is not found or shown that the defects in the coal were visible on inspection; but, on the contrary, it negatively appears from the conduct of both the vendors and vendee that they were not discernible on inspection. A further answer to this point is found in the proposition that the evidence authorized the finding that there was a warranty as to the quality of the coal sold." And, further, the court said: "We are, however, of the opinion that, upon the evidence, the contract contained a warranty of quality which survived the acceptance of the goods. * * * A contract of sale which points out a known and ascertainable standard by which to judge the quality of goods sold, is, for all practical purposes, a sale by sample, and renders the vendor liable for damages upon a breach of warranty, although there has been an acceptance after opportunity to inspect the goods;" that in case of an executory contract for the manufacture and sale or delivery of goods of a particular description, however, where, after full opportunity for inspection the goods are accepted and no warranty attends the sale, the vendee is precluded from recovering damages for any variation between the goods delivered and those described in the contract.

In the *Brigg* case the contract sued on was one by which the defendants bought goods of the plaintiffs by sample, which represented sound and merchantable goods, suitable for and known as cloakings, and which the plaintiffs agreed should in all respects be equal to the samples. It was held that there was an express warranty as to the quality of the goods agreed to be furnished — a situation that has no application to this case, which was simply an agreement to manufacture and deliver certain goods specified of a certain prescribed quality.

We think, therefore, that the judgment must be reversed and a new trial ordered, unless the plaintiff is willing to deduct from the verdict the sum of \$646, the amount paid for the wrenches delivered; and that upon the plaintiff stipulating to reduce the judgment as entered to the sum of \$1,801.47, the judgment as so modified and the order appealed from will be affirmed, without costs; if

the plaintiff fails to make such stipulation, the judgment and order must be reversed, with costs to the party finally prevailing in the action to abide the event.

VAN BRUNT, P. J., and McLAUGHLIN, J., concurred; HATCH and LAUGHLIN, JJ., dissented.

LAUGHLIN, J. (dissenting):

The terms of the contract are not in dispute. As shown in the record now before us the contract is the same as that appearing in the record on a former appeal herein and stated in the opinion. (*Ideal Wrench Co. v. Garvin Machine Co.*, 65 App. Div. 235.) Upon the former trial the plaintiff was nonsuited. We reversed the judgment upon the ground that the case should have been submitted to the jury; but for the guidance of the court upon the new trial we expressed our opinion upon other questions presented and discussed. It was stated in the opinion, in which the majority of the court concurred, that this was a contract for the sale of wrenches to be manufactured in accordance with a sample or model, prepared and agreed upon by the parties, and the defendant having covenanted that the wrenches would be "made in a first-class manner, in every way equal to that of the model submitted," that this was a warranty that the wrenches would conform to the sample, and that plaintiff's assignor, therefore, was not obliged to inspect and reject the wrenches when delivery was tendered, but was at liberty to accept and retain them and offset his damages against any claim that the defendant might have for the contract price, or could recover his damages in an independent action. Upon the new trial, which we awarded, the court followed our opinion on the former appeal. The only reason now assigned in the prevailing opinion for a reversal or modification of the judgment is that the court erred in holding, in accordance with our former opinion, that this was a sale by sample and that there was a warranty that the wrenches would conform to the model. The theory of the prevailing opinion seems to be that all sales of goods not *in esse* are executory contracts for the manufacture and delivery of goods, and that the purchaser must, at his peril, within a reasonable time after delivery, or tender of delivery, inspect and reject those that do not conform to the contract, and this even though the goods were to be manufactured to conform to a particular sample or model which was made the basis of the contract.

The doctrine of a sale by sample was originally only applied to a sale of goods *in esse*, where, for convenience, a sample was taken from the bulk of the goods and exhibited to the purchaser, who, in purchasing, had a right to believe that the sample exhibited was a fair sample and that the bulk of the goods conformed thereto. This doctrine, however, has been extended as the methods of doing business have changed. Manufacturers of goods now prepare a sample, and before expending money in the extensive manufacture of goods in accordance with the sample, or concurrently therewith, by exhibiting the sample, solicit orders for goods to conform thereto. Such contracts are now regarded as sales by sample, and the doctrine of warranty which applied only to goods in existence has now been extended to them. Under the rule as it originally existed, if the defendant had a quantity of bicycle wrenches manufactured and in stock, and presented one to the plaintiff's assignor as a sample in reliance upon which those in stock were purchased, there can be no doubt that the purchaser would not have been obliged to inspect the wrenches when delivery was tendered and to reject them if they did not conform to the sample wrench exhibited, but that he might accept them and maintain an action for damages for breach of the warranty. I see no difference in principle, so far as this question of warranty is concerned, between such a sale and the sale in the case at bar, where the sample wrench was agreed upon, and the defendant, without other description than the sample, contracted to manufacture and deliver wrenches to conform thereto. The only possible difference there can be is that if the wrenches were in existence at the time of making the contract the vendor would or could know whether or not they conformed to the sample. In the case at bar, while it was originally understood that the plaintiff's assignor was to furnish the sample, the defendant subsequently, by mutual consent, manufactured it. The defendant undoubtedly had the model from which it was made, or could readily make one and thus insure that the wrenches to be manufactured would correspond in all dimensions with the sample. Presumably, also, the defendant knew the quality of the material from which the sample wrench was made, and could obtain the same quality of material for manufacturing wrenches to fill the order; but that is immaterial, for the defect here complained of relates not to *material*, but to *dimensions*, it having been shown

on the part of the plaintiff that the dimensions did not conform to the sample in the particulars stated in our former opinion. The defendant contracted to manufacture the wrenches in accordance with a *particular pattern without other description*. It failed to perform its contract in this regard, and contends that the plaintiff's assignor can have no relief on account of his failure to promptly inspect and return the wrenches. The cases cited on the former opinion were then regarded as sufficient to show the extension of this doctrine of sales by sample and warranty. The rule there cited is now attacked by the prevailing opinion, and it is claimed that the authorities cited do not sustain it. It, therefore, becomes necessary to make a more extended examination of the authorities. In *Gurney v. Atlantic & G. W. Ry. Co.* (58 N. Y. 358) the point decided was that where certain railroad frogs were manufactured under an executory contract and they did not conform to the pattern or sample, in that there were latent defects discoverable only by use, the purchaser, upon discovering the defects, was not obliged to rescind the contract and return the frogs, but could retain them and recoup his damages as for a breach of warranty, the court on this point following *Day v. Pool* (52 N. Y. 416). The observations made in the opinion, quoted by Mr. Justice INGRAHAM, as to whether a recovery could have been had if the defects had not been latent were, therefore, *obiter*. The case of *Zabriskie v. C. V. R. R. Co.* (131 N. Y. 72), cited in our opinion as an authority for the proposition that this was in effect a sale by sample, is cited by Mr. Justice INGRAHAM as holding a contrary doctrine. That was an action to recover the contract price of coal. The coal was delivered under a contract by which the vendors agreed to sell and deliver to the defendant during the year ending June 1, 1888, 30,000 tons of "Powelton coal, of same quality and kind as furnished you during the past year." It does not appear from the statement of facts whether the coal had been mined or was even owned by the vendors at the time of making the contract. The same vendors had furnished the defendant a quantity of Powelton coal the previous year. The court decided that this was "practically a sale by sample" and stated in the opinion that "although the standard selected for comparison was not present, or in existence, even, at the time of the sale, its qualities had been observed and demonstrated, and were capable of

exact ascertainment by the evidence of those who had witnessed the results produced by the consumption of the coal. It was unnecessary for the purpose of effecting a comparison of the respective qualities of the two specimens of coal that they should be present and compared side by side, or tested at the same time. * * * The standard selected for testing the quality of the goods sold was considered sufficiently definite and precise by the parties to the contract, and it does not appear that there was any difficulty in practice in applying it to the subject. A contract of sale which points out a known and ascertainable standard by which to judge the quality of goods sold, is, for all practical purposes, a sale by sample, and renders the vendor liable for damages upon a breach of warranty, although there has been an acceptance after opportunity to inspect the goods." The court also distinguishes that case from the cases of *Coplay Iron Co. v. Pope* (108 N. Y. 232); *Studer v. Bleistein* (115 id. 316), and *Pierson v. Crooks* (Id. 539) upon the ground that they were executory contracts for the manufacture and sale or delivery of goods "of a particular description," and further said in distinguishing the case then at bar from executory contracts of sale by a particular description: "While the term 'Powelton coal' may be said to be a descriptive term, merely, when it is said that the coal was to be Powelton coal of the same quality and kind as that delivered in the previous year, it goes beyond mere words of description, and refers to the intrinsic value of the goods sold in language which cannot be misunderstood, and can be satisfied only by a consideration of its fitness to perform the work required of it in the defendant's business." It is also claimed in the prevailing opinion that the case of *Brigg v. Hilton* (99 N. Y. 517), cited in our former opinion upon the same proposition, is not in point. There an order for cloth was given, the goods to be "similar fabric and similar quality" to sample exhibited. The "general characteristics of the goods all through were stated to be equal in every respect to the sample." The goods were subsequently manufactured, delivered and accepted after ample opportunity to examine them. The vendee, on being sued for the purchase price, counterclaimed damages for breach of warranty. It appeared that the defects could have been discovered upon examination. The court held that there was a warranty that the goods to be furnished would be of like quality as the sample and

that the circumstance that the goods had not been manufactured did not affect this question. The case of *Pierson v. Crooks* (115 N. Y. 539), cited by Mr. Justice INGRAHAM, I think is not in point. That was an executory contract for the sale of goods by description and there was no sample or model exhibited or involved in the contract. There being no express warranty, it was held that the purchaser could not be heard to complain that the goods were not of the quality described in the contract where, after reasonable opportunity for inspection, he accepted and retained them. If it may be said that this question was previously involved in doubt, I think it has been finally determined by the Court of Appeals in *Henry & Co. v. Talcott* (175 N. Y. 385), decided since our former opinion. That was an action for goods sold and delivered under an executory contract for the manufacture thereof. The defendant interposed a counterclaim for breach of warranty, claiming that the goods were to be manufactured according to certain samples. It appeared that the defendant accepted, retained and used the goods. The defendant gave evidence tending to show that the goods were to be "equal to certain samples;" and evidence was presented in behalf of the plaintiff tending to show that the sample was merely intended to show the design, character, color and general appearance of the cloth. The defendant also attempted to show that the goods were defective in quality; but this evidence was also excluded upon the theory that it was not a sale by sample and that no warranty survived acceptance. The court in reversing the judgment for error in excluding this evidence held that the evidence presented a question for the jury as to whether it was a sale by sample and stated the rule of law to be that "upon a sale by sample there is an express warranty that the goods are equal in quality to the sample furnished. * * * The seller need not state that the bulk of the goods corresponds with the sample as the warranty is 'implied in fact' and is express, for it must be found as a fact that the parties intended the sale to be made by sample, and that the exhibition of the sample was regarded by them as in effect an affirmation as to the quality of the articles sold. (*Gurney v. Atlantic & G. W. Ry. Co.*, 58 N. Y. 358, 364; Keener on Quasi-Contracts, 5.) In the absence of fraud the warranty does not cover latent defects, unless the seller is the manufacturer, when it may extend to latent defects growing out of the

process of manufacture. If upon delivery the goods fall below the quality of the sample the buyer may either reject them or may accept and sue for damages upon the warranty. (*Zabriskie v. Central Vt. R. R. Co.*, 131 N. Y. 72; *Kent v. Friedman*, 101 N. Y. 616; *Day v. Pool*, 52 N. Y. 416.) The rule is the same whether the goods are in existence at the time of the contract of sale or are to be manufactured, although it is sometimes said that such a sale is not technically one by sample. (*Brigg v. Hilton*, 99 N. Y. 517; *Gurney v. Atlantic & G. W. Ry. Co.*, *supra.*) The mere exhibition of a sample is not of itself an agreement to sell by sample, and it is usually a question of fact for the jury to decide whether, under all the circumstances, the parties intended that the sale should be made in that way. Even if the word 'sample' is used in a written order for goods to be manufactured, the sale is not by sample if the order contains minute specifications and descriptions, involving a great number of changes, variations and differences between the article to be made and the sample shown. (*Smith v. Coe*, 55 App. Div. 585; affirmed, 170 N. Y. 162.) A sale, however, may be made partly by description and partly by sample, and in that event the goods must correspond to the description in the respect covered thereby and to the sample in other respects. (*Bach v. Levy*, 101 N. Y. 511, 514; *Gould v. Stein*, 149 Mass. 570; *Burdick on Sales*, 95; *Benjamin on Sales* [7th ed.], 684*.) If the goods, when delivered, do not equal the sample, the buyer need not return them in order to recover for the breach of warranty, although an offer to return is necessary if he wishes to rescind the sale and sue for the amount paid in advance of delivery."

I am, therefore, of opinion that the judgment should be affirmed, with costs.

HATCH, J., concurred.

Upon plaintiff stipulating to reduce judgment as entered to the sum of \$1,801.47, judgment as so modified and order appealed from affirmed, without costs; otherwise judgment and order reversed and new trial ordered, with costs to the party finally prevailing in the action to abide event.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ROBERT
A. AMMON, Appellant.

Crime — receiving stolen money — delivery to an attorney by his client (the thief) of money which the attorney deposits to his credit in a bank — proof that the attorney failed to deliver it to a receiver of the thief's property — the thief was not an accomplice of his attorney — extent to which the evidence of the thief, if an accomplice, must be corroborated — declaration of the attorney as to the thief's methods — reiteration of a charge not required.

Upon the trial of an indictment charging the defendant with the crime of receiving \$30,500 which one Miller had stolen, it appeared that the defendant was Miller's attorney and was familiar with the methods by which Miller obtained the money in question; that on one occasion Miller came to the defendant's office with the \$30,500 in a satchel and that the defendant advised him to flee from the country; that the defendant and Miller, the defendant carrying the satchel, then went to a banking house where Miller had a bank account of \$10,000 and a deposit of \$100,000; that on reaching the banking house, Miller attempted to withdraw the deposit of \$100,000, but was unsuccessful, as it was after banking hours; that Miller finally determined to transfer his account and the deposit to the defendant, that in the meantime the \$30,500 was handed to the receiving teller of the bank to be counted; that after the receiving teller had counted the money, the defendant prepared three deposit slips, one for the certificate of deposit of \$100,000, one for a check of \$10,000 signed by Miller to the order of the defendant, and one for the \$30,500 in cash. These slips were handed to the receiving teller with the money that had been brought to the bank by the defendant. The certificate of deposit, the check and the money were placed to the defendant's credit in the bank and were subsequently withdrawn by him.

Held, that the evidence was sufficient to sustain a finding that the defendant received the \$30,500;

That Miller never parted with his title to the money until, with his consent, it was transferred to the defendant and by the latter deposited with the bank;

That proof of the defendant's failure to pay any of the money and property received by him from Miller either to the receiver of Miller's property appointed by the Supreme Court or to Miller's receiver in bankruptcy, was competent as evidence characterizing the knowledge and intent with which the defendant received such money;

That Miller, in delivering the money to the defendant, did not become an accomplice of the defendant;

That, assuming that Miller was an accomplice of the defendant, it was not necessary that all of Miller's testimony, except that which was corroborated, should be disregarded when determining whether the defendant was innocent or guilty;

That sufficient corroborative evidence had been given to satisfy the requirements of section 899 of the Code of Criminal Procedure, providing that "a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime;"

That any declaration or admissions of the defendant, in relation to the methods by which Miller obtained the stolen moneys, were competent evidence as to the defendant's knowledge of such methods;

That a judge is not bound to reiterate to the jury instructions which he has already distinctly given to the jury.

APPEAL by the defendant, Robert A. Ammon, from a judgment of the Court of General Sessions of the Peace in and for the city and county of New York, entered on the 29th day of June, 1903, convicting the defendant of the crime of receiving stolen property, and also from an order denying the defendant's motions for a new trial and in arrest of judgment.

Arthur C. Palmer, for the appellant.

Robert C. Taylor, for the respondent.

INGRAHAM, J. :

The defendant was indicted under section 550 of the Penal Code for receiving stolen property, to wit, \$30,500, which had been stolen or wrongfully appropriated in such a manner as to constitute larceny, by one William F. Miller, from various persons. That section, when the crime was committed and the indictment was found, provided that "a person who buys or receives any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this chapter, knowing the same to have been stolen or so dealt with, or who corruptly, for any money, property, reward or promise or agreement for the same, conceals, withholds or aids in concealing or withholding any property, knowing the same to have been stolen or appropriated wrongfully in such a manner as to constitute larceny under the provisions of this chapter, if such misappropriation had been committed within the State, whether such property were so stolen or misappropriated within or without the State, is guilty of criminally receiving such property." (See Laws of 1881, chap. 676, § 550.)

It was proved upon the trial that Miller had organized what he

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called the "Franklin Syndicate" for the purpose of inducing persons to invest money with him to be used in speculation, agreeing to pay the depositors ten per cent a week for the use of the money, the depositors to have the right to withdraw the money at any time on demand. Miller was convicted of larceny and that conviction was sustained by the Court of Appeals (*People v. Miller*, 169 N. Y. 339). The opinion in that case stated the general outline of the defendant's transactions, and the scheme that he adopted is there characterized as one "formed in order to appropriate to himself the money of the credulous and unwary," and it was there said that the "whole project, from beginning to end, was a transparent swindle." Miller, who was serving his sentence in State's prison, was produced as a witness upon this trial and testified to his operations, and it is only necessary to say that the evidence was amply sufficient to establish that Miller was guilty of the crime and that the money which he received from his dupes had been wrongfully appropriated in such a manner as to constitute larceny as defined by section 528 of the Penal Code. The question, therefore, to be determined is whether the defendant received any of the money thus wrongfully appropriated by Miller knowing the same to have been stolen or so dealt with.

It was proved upon the trial that Miller commenced his operations in March and continued them until the twenty-fourth of November, when the place was closed by the police and Miller was indicted. On the twenty-second of November Miller had received upwards of \$30,500 from persons who had deposited money with him in accordance with the scheme that he had adopted. This money was in bank bills and was kept by Miller at his place of business during the night of November twenty-second. Prior to that time Miller had consulted the defendant in relation to his scheme and the defendant had advised him as to the method that he should adopt in order to avoid criminal responsibility. On November twenty-third Miller, taking this sum of \$30,500 in bills of various denominations that had been received on the day before, went with one Schlessinger, who was connected with Miller in his operations, to the defendant's office. Miller testified that, after some conversation with the defendant, Schlessinger said that the "jig was up" and the defendant, being asked what he thought, said, "Billy, I think

you have to make a run for it ;" that " the best thing for you to do is to go to Canada." Miller and the defendant then started together to the banking house of Wells, Fargo & Co., where Miller had an account in which there was upwards of \$10,000 to his credit. He also had a certificate of deposit of Wells, Fargo & Co. for \$100,000, and Wells, Fargo & Co. held for him United States bonds that had been purchased by Miller with the proceeds of this larceny of the par value of \$40,000. Before starting from the defendant's office Miller stated to defendant that he was afraid of getting arrested with the satchel in which had been placed this sum of money, whereupon the defendant took the satchel containing the money and carried it to the banker's office. Upon his arrival at the banker's office Miller attempted to withdraw the \$100,000 represented by the certificate of deposit, but payment was refused upon the ground that it was after banking hours. The defendant and Miller had then some conversation with the cashier of the banking house, and Miller finally determined to transfer the balance of his account and the amount represented by the certificates of deposit to the defendant. In the meantime this sum of money had been taken out of the satchel and handed to the receiving teller at the banking house to be counted. After the receiving teller had counted the money and reported that there was \$30,500, the defendant prepared three deposit slips, one for the certificate of deposit, one for a check of \$10,000 signed by Miller to the order of the defendant upon the banking house, and one for the \$30,500 in cash, and these slips were handed to the receiving teller with the money that had been brought to the bank by the defendant. The certificate of deposit, Miller's check and the money, aggregating \$140,500, were placed to the defendant's credit in the bank and subsequently drawn out by the defendant, and his account was closed. The transactions in the banking house as here outlined were testified to by the cashier of the banking house and were not disputed.

The first question is whether this evidence is sufficient to sustain the finding of the jury that the defendant received this \$30,500. It is claimed by the defendant that the money having been deposited by Miller or handed over to the banking house for the purpose of being deposited for his account, there was thereby created between the banking house and Miller the relation of debtor and creditor,

and that such transfer was not a receipt of the stolen property within the provisions of section 550 of the Penal Code, but it is entirely clear that there was no deposit of the money by Miller by which the title to the money vested in the bankers and Miller became a creditor to the bankers for the amount. The money was delivered to the receiving teller to be counted, and pending the counting of the money its disposition was to be determined by Miller. He would have been entitled to receive back at any time before it was finally deposited by the defendant the identical money which was in the hands of the teller of the banking house. He never parted with his title to the money until, with his consent, it was transferred to the defendant and by him deposited with the bankers. When the defendant made out the deposit slip which placed this money to his credit and that slip was received by the banking house with the money, whether it was in the defendant's actual custody or not, he then received the money which, prior to that time, had been in possession of Miller, and appropriated it to his own use.

It is also, I think, entirely clear that when the defendant received this money, he received it with knowledge that it had been acquired by Miller in the manner described. He had been Miller's legal adviser for some weeks before the final catastrophe. He advised with Miller as to the course to be adopted when his scheme should collapse. He went with Miller to the banking house to enable him to withdraw the amount on deposit. While there he received from Miller an amount exceeding \$140,000, besides a large amount of bonds or other securities, and then aided Miller in his escape. That the defendant had full knowledge of the situation and the method by which Miller had obtained this money is abundantly proved by uncontradicted evidence, and his subsequent acts in relation to this money and property received from Miller, and his failure to pay any of it either to the receiver appointed by the Supreme Court, or to the receiver in bankruptcy as Miller's money, justifies the inference that the money was received with the intention of preventing its being applied in the discharge of Miller's obligations. And such subsequent acts are competent as characterizing the knowledge and intent with which the money or property was received. No man

who had innocently received a sum of money under these circumstances would have hesitated to restore the money to its lawful owners.

Another question that should be noticed is the claim by counsel for the defendant that as Miller was an accomplice, his testimony could only be received as against the defendant when corroborated by independent testimony. As I understand the claim of the learned counsel for the defendant, it is that all the testimony of Miller not corroborated by independent testimony must be excluded in determining whether or not there was evidence which justified the conviction. It is not clear that Miller can be said to be an accomplice. The crime charged is that defendant received this money which had been stolen by Miller, with knowledge that it had been stolen. Was Miller an accomplice in the act of the defendant in receiving this money? He was the thief who had stolen it, and he had delivered it to the defendant. It was the act of the defendant in receiving the money with a guilty knowledge that constituted the crime; and whether he received it from the thief or from any one else, he was guilty, and I do not see how, strictly speaking, Miller in delivering the property to the defendant became an accomplice with the defendant in the crime which consisted in the receipt of the money.

Assuming, however, that Miller was an accomplice, it does not follow that all of Miller's testimony except that which is corroborated is to be disregarded in determining the question of the defendant's guilt or innocence. The section of the Code of Criminal Procedure upon which the defendant relies is section 399, which provides that "a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." This is a very different proposition from that insisted upon by counsel for the defendant. The testimony of Miller as to the method by which he obtained this money was corroborated by some of his victims and by those in his employ; and if it was necessary to corroborate his evidence in this respect, such corroboration was ample. The crime was receiving this money, knowing it to be stolen. That the defendant received the money is clearly established by satisfactory evidence. He received it under such circumstances and acted in

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relation to it in such a way as itself would corroborate the testimony of Miller as to his knowledge of the method by which the money had been obtained; and with the further evidence that he had been Miller's legal adviser, had been present on several occasions on the premises where the money was received, there was sufficient to corroborate Miller's testimony that the defendant had been informed by Miller of the whole scheme and was actively aiding him in his endeavor to escape criminal responsibility for his acts. As was said in *People v. O'Farrell* (175 N. Y. 323): "The corroboration must be of a character and quality which tends to prove the defendant's guilt by connecting him with the crime. If there is evidence fairly tending to show such connection so that the conviction will not rest entirely upon the evidence of the accomplice, then the question whether the evidence is a sufficient corroboration to induce the jury to find against the defendant is for it to determine." Thus, the defendant's connection with the crime was substantially proved by independent evidence, and there is no reasonable doubt of his guilt.

The only remaining question is whether there was any error committed which would require us to reverse such conviction. The court in the charge to the jury, after reading section 550 of the Penal Code, told the jury that the questions they were to determine were: (1) Whether any property had been wrongfully appropriated in such a manner as to constitute larceny; (2) did the defendant receive the same knowing it to have been stolen; and (3) did he receive it with a felonious intent? The jury, at the request of the defendant, were specifically instructed that before they could convict the defendant they must find that the said sum of \$30,500 was stolen by William F. Miller; *second*, that the sum of \$30,500 so stolen by William F. Miller was received by the defendant; and, *third*, that at the time the defendant received the said sum of \$30,500 he actually took it into his possession for the purpose of claiming ownership in the identical money which had been stolen by said Miller; *fourth*, that at the time he received the identical money, the proceeds of the larceny committed by said Miller, the defendant knew that the said money had been stolen. This certainly was as specific and as favorable to the defendant as was justified; and the subsequent requests to charge which the court

refused in the language requested, even though some of those requests contained correct legal propositions, in view of this explicit instruction, were not improperly refused. A judge is not bound to reiterate instructions to the jury that he has distinctly given. The court also at the request of the defendant expressly charged that the various other acts of the defendant which had been testified to, such as the advice that it was alleged he had given Miller, and the receipt by the defendant of the other sums of money or the use that the defendant made of this money after he had received it, would not justify the conviction of the defendant. Taking the charge as a whole, with the requests made by the defendant which the court charged, the case was presented to the jury in a way that insured to the defendant all of the rights which the law gave him, and in view of the instructions given it is clear that the jury expressly found from the evidence which, we think, clearly justified their finding, that the essential acts required by the statute to constitute the crime were proved and that the defendant was guilty.

There are scattered through this record many exceptions to evidence, some of which are relied upon by the defendant. They have all been examined, but there are none, we think, that would justify a reversal of the judgment. The testimony that was given by Mr. Clarke, the district attorney of Kings county, who conducted the prosecution against Miller, consisted entirely of a conversation that he had with the defendant after Miller's escape and before he returned. The defendant at that time represented himself to the district attorney as Miller's counsel, and the discussion was in relation to Miller's whereabouts, with an intimation from Mr. Clarke to the defendant that the defendant might be considered as an accomplice. I do not think that this testimony can be said to be incompetent. The question that the jury had to determine was as to the defendant's knowledge of the methods by which Miller had obtained this money which he had turned over to the defendant. Any declarations or admissions of the defendant in relation to Miller's methods by which he obtained the money were competent evidence as to that knowledge, and although this conversation may have had but slight relevancy upon this question, it was not, I think, incompetent. As the testimony was of a conversation with the defendant, the only objection to it would be that it was immaterial; it would

not justify us in reversing the judgment. I do not consider it necessary to discuss the other exceptions to rulings upon the admission or rejection of evidence, as I am satisfied that none of the rulings about which there is a question could possibly have injuriously affected the defendant.

I have thus stated the reasons which have satisfied us that this conviction should be sustained, without specifically answering all of the objections of counsel for the defendant. The size of this record and the length of the defendant's argument would preclude an answer to all the arguments submitted by the defendant within the reasonable limitation of an opinion. We think, however, enough has been said to indicate our views upon the main questions presented, and as upon the whole case we are satisfied that no error was committed which would justify a reversal of the conviction, it follows that the judgment appealed from must be affirmed.

VAN BRUNT, P. J., PATTERSON and LAUGHLIN, JJ., concurred ;
HATCH, J., concurred in result.

Judgment affirmed.

PHILIP L. SMITH, Respondent, v. METROPOLITAN STREET RAILWAY
COMPANY, Appellant.

Negligence — injury from a collision between an open street car and a truck by reason of which a passenger is struck by the shaft of the truck — a verdict of \$25,000, where there is neither the loss of a limb nor total disability, reduced.

In an action brought to recover damages for personal injuries, it appeared that the plaintiff was a passenger upon one of the defendant's open street cars; that the motorman of the car, without stopping it, attempted to pass a truck traveling in the opposite direction; that a collision resulted in consequence of which the shaft of the truck was thrown over upon the car and the plaintiff was injured thereby.

Held, that a judgment entered upon a verdict in favor of the plaintiff should be affirmed;

That whether the collision was the result of the negligence of the motorman in attempting to pass the truck without stopping was a question for the jury;

That although the plaintiff's injuries were very severe and he would never fully recover therefrom, yet, as he was not totally disabled and was, at the time

of the trial, able to attend to his business, a verdict of \$25,000 was excessive and should be reduced to \$20,000;

That such a sum as \$25,000 may properly be awarded only where, by the loss of a limb or other total disability, the plaintiff is permanently disabled.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 29th day of May, 1903, upon the verdict of a jury for \$25,000, and also from an order entered in said clerk's office on the 28th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

Charles F. Brown, for the appellant.

William N. Cohen, for the respondent.

INGRAHAM, J. :

On the 26th day of July, 1899, the plaintiff boarded one of the defendant's open cars at the corner of Rector street and Trinity place. He occupied a seat on the fourth bench from the front on the west side of the car. The car proceeded up West Broadway, and between Grand and Broome streets the plaintiff was severely injured by the shaft of a truck striking him in the breast. He testified that when the car was near Broome street, he noticed a one-horse truck coming down upon the east track upon which the car he occupied was proceeding; that the driver of the truck did not turn off the track and the motorman did not stop the car; that as the car approached the truck the horse attached to the truck turned to get off the track; that after the horse left the track there was a crash, and immediately afterwards he found himself sitting on the seat upon the east side of the car one or two benches behind the one he had been occupying and discovered that he had been severely injured in his right breast; that he was taken to a hospital where he remained until some time in September, when he was sent to Maine with a trained nurse; that in November he returned to the hospital, remaining there until November twenty-ninth, and was not able to return to his regular business until May, 1902. Upon cross-examination he testified that the collision occurred when the car was

about midway between Grand and Broome streets; that the driver of the truck did not turn off the north-bound track until the car and the truck were twenty or twenty-five feet apart; that then the horse turned sharply to the west; that the horse was clear of the track before the collision, and at the time of the collision the horse was facing in a southwesterly direction. The plaintiff's testimony was corroborated, and there was evidence that after the collision the car went for about seventy-five feet and that the truck was on the west of the railroad track near the gutter.

Upon the part of the defendant there was testimony tending to show that this truck with which the car collided was going downtown upon the west track, and not upon the east track upon which the car on which the plaintiff was a passenger was proceeding; that after the front of the car had passed the truck one of the cases upon the truck fell and struck the roof of the car and then fell down between the car and the truck, and immediately afterwards something struck the plaintiff. The motorman testified that the truck was upon the west track; that he passed the truck in safety and that there was room for his car to pass the truck without a collision; that as he approached the truck he slowed down until he was within ten or fifteen feet of the truck, then noticed that there was room enough for his car to pass, and he continued on; that when the front of his car reached the middle of the truck between the front and back wheels he heard a commotion behind him, when he stopped his car; that when he stopped the front end of the car was parallel with the rear end of the truck. The mechanic who repaired the car testified that there was no injury or mark on the front of the car; that one of the stanchions that supported the roof was broken, and two were damaged, and four pillar bars were bent; that the back of one seat was also broken.

There would seem to be no doubt but that the plaintiff was injured by the shaft of this truck striking him while seated upon the west or left-hand side of the car. The man who repaired the car testified that there was no damage to the roof of the car; but it is apparent that this accident could not have been caused by the fall of a case from the truck, unless the car had come in collision with the truck. If there had been such a collision it is quite probable that it would have caused a case to fall. Whether or not the truck was

upon the track upon which the car was proceeding, or partly upon the westerly track, does not seem to be material. If the situation was such that the car could not pass the truck without a collision, it was the duty of the motorman to stop the car in time to avoid the truck; and for the negligent performance of that duty, from which resulted an injury to a passenger, the defendant was responsible. That there was such a collision, and that as the result thereof the shaft of the truck was thrown over upon the car is the necessary conclusion to be drawn from the evidence. It was then a question for the jury to say whether that collision was caused by the negligence of the motorman in attempting to pass the truck. That the plaintiff was severely injured as a result of the collision between the car and the truck in the street, and that that collision could have been avoided by the motorman stopping the car when he saw the truck approaching, is evident. Whether that collision was the result of the negligence of the motorman in attempting to pass this truck, as he did, without stopping, was a question for the jury; and with its verdict that there was negligence, I do not think we would be justified in interfering.

The only other question presented relates to the damages. The jury fixed the amount at \$25,000. While it is true that the injuries to the plaintiff were very severe and that he will never fully recover, the plaintiff is not totally disabled. At the time of the trial he was able to attend to his business. This condition having been caused, as found by the jury, by the negligence of the defendant's employees, the damages should be sufficient to compensate him so far as possible for the injury; and the amount that would be sufficient to compensate him was for the jury to determine, subject to a review by this court if it should appear that the amount awarded was beyond what is a fair compensation. We think, however, that \$25,000 was excessive, as such a sum is only awarded where by the loss of a limb, or an accident which has caused a total disability, a person is permanently disabled. We have come to the conclusion therefore, that this verdict should not, under the circumstances, exceed the sum of \$20,000, and the judgment and order must for that reason be reversed and a new trial be ordered, with costs to appellant to abide the event, unless the plaintiff stipulates to reduce the judgment as entered, including costs and allowance, to the sum

of \$20,549.35; in which event the judgment as so modified and the order appealed from are affirmed, without costs of this appeal.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Upon plaintiff stipulating to reduce judgment as entered, including costs and allowance, to \$20,549.35, judgment as so modified and order affirmed, without costs; otherwise judgment reversed and new trial ordered, costs to appellant to abide event.

NEW YORK HOUSE WRECKING COMPANY, Respondent, v. JOHN F. O'ROURKE, Appellant.

Contract for the sale of old material—a clause therein "I reserve the right, however, to keep whatever I want of the iron, safes and stone"—it may be explained by proof of the oral negotiations—the vendor cannot, without specifying particular articles, refuse to deliver any of the property.

A contract was created by the acceptance of the following offer: "I herewith beg to offer you all the old safes, iron or any other metal now forming part of the old Stock Exchange Vaults, for the sum of Eight Dollars and fifty cents (\$8.50) per ton of 2,000 pounds, and the granite at 25 cts. per cubic foot, all to be delivered on the sidewalk and to be carted away by you. I reserve the right, however, to keep whatever I want of the iron, safes and stone.

"Payment \$1,000.00 before delivery of any material, successive payments of \$1,000.00, as enough material is delivered to make up the respective amounts."

Held, that the words, "I reserve the right, however, to keep whatever I want of the iron, safes and stone," were sufficiently ambiguous to justify the admission, for the purpose of explaining the intention of the parties, of evidence of the verbal negotiations that led up to the contract and of evidence of conversations had between the parties immediately after the execution of the contract;

That it was intended by the provision in question that the vendor should have the right to exclude from the contract any special article included within the general description of the property sold, but that, in order to exercise this right, it was necessary that the vendor designate the specific article which he desired to exclude from the contract;

That the provision in question did not entitle the vendor, without specifying any article which he wished to exclude from the contract, to refuse to deliver to the vendee any of the property sold.

APPEAL by the defendant, John F. O'Rourke, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office

of the clerk of the county of New York on the 28th day of May, 1903, upon the decision of the court rendered after a trial at the New York Trial Term, a jury having been waived.

Pierre M. Brown, for the appellant.

Dean Emery, for the respondent.

INGRAHAM, J. :

The action was brought to recover damages for the breach of a contract whereby the defendant agreed to sell and deliver to the plaintiff, and the plaintiff agreed to buy from the defendant, all of the old safes, iron or other metal forming a part of the old Stock Exchange vaults. The contract was in the form of a letter written by the defendant to the plaintiff, which is as follows :

"NEW YORK, Jan. 22nd, 1902.

"NEW YORK HOUSE WRECKING Co.,

"514 E. 23rd St., N. Y. :

"GENTLEMEN.—I herewith beg to offer you all the old safes, iron or any other metal now forming part of the old Stock Exchange Vaults, for the sum of Eight Dollars and fifty cents (\$8.50) per ton of 2,000 pounds, and the granite at 25 cts. per cubic foot, all to be delivered on the sidewalk and to be carted away by you. I reserve the right, however, to keep whatever I want of the iron, safes and stone.

"Payment \$1,000.00 before delivery of any material, successive payments of \$1,000.00, as enough material is delivered to make up the respective amounts.

"Very truly yours,

"(Signed)

JOHN F. O'ROURKE,

"MUELLER.

"Copy

"Accepted

"NEW YORK HOUSE WRECKING Co..

"L. BENJAMIN, V. P."

The plaintiff paid the \$1,000 upon the execution of the contract and proceeded to take out the safes. After the plaintiff had removed about 110,000 pounds of the vault plates, the question as to the removal of the vaults came up, when the plaintiff's

representative suggested to the defendant's manager, who was in charge of the work, that to make the boxes lighter the doors should be broken off. The defendant's manager made no objection, and plaintiff's employees proceeded to do as suggested, whereupon the defendant wrote the plaintiff the following: "Contrary to our agreement, a number of your men went into the Safe Deposit Vaults at the New York Stock Exchange and wrecked a good number of safes, which damage as well as any other, I expect you to make good, or I will do so and charge it to your account. In consequence of this act on the part of your employees, I would ask you to withdraw, as no further material will be delivered to you."

Subsequent to this letter the defendant refused to deliver to the plaintiff any more of the materials described in the contract. The defendant's manager, when asked what was the matter, replied that he had instructions not to let the plaintiff's men have any more of the materials, and the plaintiff seeks to recover in this action the damages sustained because of a refusal of the defendant to carry out the contract. There was evidence as to the value of the materials to which plaintiff was entitled under the contract, and a jury having been waived, the court found that there was a breach of the contract by the defendant, and that the damages sustained by the plaintiff amounted to \$1,780, for which judgment was directed.

There is a statement in the case that it contains "all the evidence offered and received upon the trial, except expert evidence on both sides as to value of materials which were the subjects of the contract in question, as to which values no question is raised upon this appeal." The question, therefore, that we have to determine is whether the finding of the court that there was a contract and a breach thereof by the defendant was sustained by the evidence. The defense depends upon the construction to be given to the clause in this letter by which the defendant reserved the right to keep whatever he wanted of the iron, safes and stone. It is evident that the parties intended to sell something. It was certainly not intended that the defendant could refuse to deliver any materials and retain the \$1,000. The language used was ambiguous and it was sufficient to justify, I think, evidence as to the verbal negotiations that led up to the contract to explain the intention of the

parties. The plaintiff offered such testimony which was objected to by the defendant and excluded. There was testimony, however, as to conversations after the execution of the contract which, although objected to by the defendant, were clearly competent as a cotemporaneous construction of this ambiguous phrase upon which the defendant now seeks to sustain his refusal to perform his contract. This testimony, which quite clearly shows the construction put upon this clause of the contract by the parties immediately after its execution, removes any doubt, if doubt there was, as to what was intended when the contract was made. As before stated, it is clear that the defendant agreed to sell and the plaintiff agreed to purchase something. Certainly it was not the intention of the parties that the day after the contract was executed and the \$1,000 received by the defendant, the defendant could abrogate the contract by saying that he desired to retain all of the articles which he had agreed to sell. What was obviously intended was, that as to any special article included within the general description of the property sold, the defendant should have the right to exclude it from what was to be delivered under the contract; but the special article that the defendant desired to exclude must be designated by him, and then as to that article the contract did not apply. Now the defendant failed to comply with this requirement. He specified no article which he wished excluded from the sale, but simply refused to deliver to the plaintiff any of the property which he had sold and for which he had been paid. That this was a breach of his contract was apparent, and for the damage sustained by the plaintiff in consequence of such breach he was clearly liable.

There are no exceptions to the admission and exclusion of testimony that require discussion.

It follows that the judgment appealed from must be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Judgment affirmed, with costs.

PIETRO RONCORONI, Respondent, v. RUDOLPH GROSS and ALEXANDER J. GROSS, Doing Business under the Firm Name and Style of THE AMERICAN CONSERVE COMPANY, Appellants.

Trade mark — use of the words "Conserva Di Tomato" not enjoined — the use of a label calculated to deceive will be enjoined.

A merchant who manufactures and sells preserved tomatoes under the description "Conserva Di Tomato," the word "Tomato" being generally understood by Italians to refer to the tomato, is not entitled to an injunction restraining another merchant from using these words to designate similar preserves, although it appears that the word "Tomato" is used only in a small territory in the north of Italy and among Italians in the United States and that there is another Italian name for tomato, to wit, "Pomodoro," which is in more general use than "Tomato."

The use by the defendants of a label in imitation of that of the plaintiff, calculated to lead the public, when purchasing the defendants' goods bearing such label, to believe that it is purchasing the plaintiff's goods, will be restrained.

APPEAL by the defendants, Rudolph Gross and Alexander J. Gross, doing business under the firm name and style of The American Conserve Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 30th day of November, 1903, granting an injunction *pendente lite*.

Jacob J. Lesser, for the appellants.

Louis Steckler, for the respondent.

INGRAHAM, J. :

By an order entered at Special Term the defendants were enjoined and restrained from using "the words 'Conserva Di Tomato' as a designation of any tomato preserves or paste, or other product manufactured, sold or dealt in by them or either of them," and, further, from in any manner using or imitating the label of the plaintiff, and from that order the defendants appeal. It appears that the word "Tomato" is an Italian word for the tomato, only used in a small territory situated in the north of Italy, and is not the Italian name for tomatoes except in that locality; that the Italian word for tomato is "Pomodoro," but that in the United States the word "Tomato"

has been generally understood by Italians to refer to the tomato, and that the phrase "Conserva Di Tomate," adopted by the plaintiff to designate the contents of the cans manufactured and sold by him, would indicate that the article was a preserved tomato. The defendants originally produced and sold the article manufactured by them under the name of "Conserva Di Pomodoro," and sometime before the commencement of this action changed the name to "Conserva Di Tomate," the same name under which the plaintiff's product had been manufactured and sold in the market. It would seem to be clear that as this name adopted by the plaintiff was Italian for preserved tomato, the plaintiff could not acquire by its use, in describing articles manufactured and sold by him, a trade mark, so that others could not use the same phrase as describing the articles manufactured and sold by them. It is the Italian for the article that the plaintiff manufactured and sold, and it is now well settled that no one can acquire a trade mark by the use of words of a foreign language which correctly describe the article manufactured any more than a trade mark can be acquired in the words of the English language, which properly describe such product. It is quite clear that the plaintiff could not, by calling this article "preserved tomatoes," acquire the exclusive right to use that phrase, nor could he, by adopting the Italian words, which are a translation of the English words describing the character of what he manufactures, acquire a trade mark in the Italian words. (*Caswell v. Davis*, 58 N. Y. 223; *Barrett Chemical Co. v. Stern*, 176 id. 27.) The words used by the plaintiff are descriptive—they are the Italian for preserved tomatoes used in a portion of Italy and among Italians in the United States; and though there is another Italian name for tomato in more general use than that adopted by the plaintiff, still the word "Tomate," more closely resembling the English name of the vegetable, is none the less a name which describes the vegetable from which the plaintiff's product is manufactured, and the name taken as a whole is a fair description of the manufactured article. This is not the case where an entirely arbitrary name, having no relation to the quality or nature of the article manufactured, has been invented by the plaintiff, but is an Italian phrase which fairly describes the manufactured article, and I think the plaintiff can obtain no exclusive right to call the manufactured article by this name. The affi-

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davits, however, disclose a clear attempt by the defendants to imitate the plaintiff's label which entitled the plaintiff to an injunction restraining the defendants from such imitation as will induce the public to believe that they are purchasing the plaintiff's goods, when in reality they are purchasing goods prepared and manufactured by the defendants.

The order must be modified by striking out the provision restraining the defendants from using the words "Conserva Di Tomate" as descriptive of the product sold, but continuing the injunction so as to restrain the defendants from using the label, a copy of which is annexed to the complaint, or any other label in imitation of that of the plaintiff, and the order appealed from, as thus modified, is affirmed, without costs to either party on this appeal.

VAN BRUNT, P. J., PATTERSON, HATCH and LAUGHLIN, JJ., concurred.

Order modified as directed in opinion, and as modified affirmed, without costs.

ERWIN W. WINGERT, Respondent, v. DAVID KRAKAUER, Defendant, and DANIEL KRAKAUER, Appellant, Carrying on Business under the Firm Name and Style of KRAKAUER BROTHERS.

Negligence — section 18 of the Labor Law applies to a scaffold used for erecting machinery in a factory — injury to a servant from the falling of a scaffold which an independent contractor, employed by the injured servant's master, was obliged to build, but which was built by the injured servant pursuant to directions from his foreman — the master is not liable.

Section 18 of the Labor Law (Laws of 1897, chap. 415), providing that "a person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged," applies to a scaffold erected for the purpose of installing machinery in a room in a factory building which previously contained no machinery.

In an action brought to recover damages for personal injuries sustained by the plaintiff in consequence of the collapse of such a scaffold, it appeared that the

defendants, who were engaged in moving their factory, entered into a contract with a machinist by which the latter agreed to move the machinery from the old factory and install it in the new one in accordance with the directions of the defendants' foreman; that he also agreed to furnish two men and all the material necessary. The machinist testified that nothing was said about the building of scaffolds for use in installing the machinery, but that it was necessary to erect scaffolds for this purpose, and that when that was the case, it was the work of the machinist to build them.

It further appeared that the plaintiff and a fellow-workman, who were in the employ of the defendants, were detailed to assist the machinists when necessary; that the foreman directed the plaintiff and his fellow-workman to build a scaffold for use in installing the machinery, and instructed them to use for the purpose timber which was then upon the premises; that there was plenty of material with which to construct the scaffold properly and safely. The plaintiff and his companion selected the timber to be used, determined the character of the scaffold and the method of constructing it and completed the same without any interference on the part of the defendants or the foreman. Subsequently, while the plaintiff, the machinists and others were upon the scaffold assisting in placing certain machinery in position the scaffold broke and the plaintiff was injured.

The accident was caused either by the improper construction of the scaffold or the use of defective material therein or by the manner in which it was used.

Held, that when the defendants' foreman directed the plaintiff and his fellow-workman to build the scaffold he was simply directing them to assist the independent contractor, and not directing how the independent contractor should do his work or furnishing either the plaintiff or the independent contractor with a scaffold;

That as the defendants were under no obligation to provide a scaffold for use in installing the machinery and did not assume such an obligation, it could not be said that the defendants built the scaffold or furnished it for the plaintiff's use; That the accident was due to the negligence of the plaintiff and his fellow-workman and not to that of the defendants.

O'BRIEN and HATCH, JJ., dissented.

APPEAL by the defendant, Daniel Krakauer, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of March, 1903, upon the verdict of a jury for \$14,000, which amount was thereafter by stipulation reduced to \$10,000, the court having granted a motion for a new trial unless the plaintiff should make such stipulation, and also from two orders entered in said clerk's office on the 20th day of February, 1903, and on the 24th day of March, 1903, respectively, denying the said defendant's motion for a new trial made upon the minutes.

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Charles C. Nadal, for the appellant.*Henry Escher, Jr.*, for the respondent.

INGRAHAM, J. :

The action is to recover the damages sustained by reason of the collapse of a scaffold built by the plaintiff and a fellow-workman and used to install machinery in a factory which was being fitted up by the defendants. Upon the former trial the complaint was dismissed upon the plaintiff's case which, upon an appeal to this court, was reversed (76 App. Div. 34). Upon the new trial the question of the defendants' negligence was submitted to the jury, who found a verdict for the plaintiff, and from the judgment thereon entered and from the order denying the motion for a new trial the defendants appeal.

Upon the former appeal the principal question discussed in the prevailing opinion was whether section 18 of the Labor Law (Laws of 1897, chap. 415) applied to a scaffold such as that erected by the plaintiff. It was there said: "The main question presented by this appeal, therefore, is, did the changes which were being prosecuted in the defendants' factory constitute the same an alteration within the meaning of the Labor Law? * * * It is certainly no greater stretch of construction to hold that placing machinery within a room, in a building, and attaching the same firmly to the ceiling, constitutes an alteration of such room, than to hold that a ship upon the ways is a structure within the meaning of the statute. * * * It is not possible to say that when this room, bare as it stood, had appliances firmly fastened to its ceiling for the purpose of supporting heavy shafting, it was not altered. It was being transformed from a bare room into a place for the manufacture of pianos; and it was in a literal sense altered to meet the requirements of the business expected to be carried on. * * * But where the alteration is of such a character as requires the use of scaffolding to effect it, then such case is fairly brought within the terms of the statute, as it constitutes the use of a structure in the alteration for which the act provides; and the necessity immediately arises for the protection of life and limb, which is the primary purpose to be accomplished. We think, therefore, that the Labor Law applies to this case, and

that the alteration brings it fairly within the terms of the statute; certainly within a liberal interpretation which the courts are bound to apply in construing it. If these views are sound, it necessarily follows that the court erred in dismissing the complaint."

In determining the question presented upon this appeal we are, therefore, to assume that section 18 of the Labor Law applied to such a scaffold as was here used. Assuming, therefore, that this provision of the Labor Law applies, we are now to determine whether the facts proved upon this trial are sufficient to justify the jury in finding that these defendants were guilty of a failure to perform the duty imposed upon them by this statute. Section 18 of the Labor Law provides that "a person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged." And the first question presented is whether these defendants did "furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged."

The plaintiff, testifying on his own behalf, explained the circumstances under which this scaffolding was constructed. The accident happened January 9, 1899. The plaintiff had been employed by the defendants in their factory from 1891 to 1899, originally as a porter. He subsequently operated a machine and worked as a joiner and planed off boards. At the time of the accident the defendants were engaged in moving their factory from One Hundred and Twenty-fifth street to One Hundred and Thirty-second street. About a week before the accident the plaintiff was directed to go up to the new factory at One Hundred and Thirty-second street to place there the machinery necessary for use in their business. While at work in the new factory he, with the other workman, was under

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the general charge of a foreman named Pickert, who was foreman of machine workers and case makers. The plaintiff worked a week in the new factory before the accident. During that time he helped to build scaffolds used in installing the machinery. The Saturday before the accident Pickert instructed the plaintiff to build a scaffold for placing in position certain shafting and pulleys in the new factory. Pickert told the plaintiff what he wanted the scaffold for and where it was to be placed, and these directions were given to one Tempe and the plaintiff. That was the only direction that the foreman gave. The plaintiff and Tempe then selected beams from some lumber that was upon the premises, and set them up from the floor to the ceiling, nailing them to the ceiling and fastening them at the floor with small blocks. After these uprights were in place and fastened to the ceiling and floor, they nailed crosspieces to these beams. Then the plaintiff and Tempe asked Pickert for the wood to finish the scaffold, and he told them to take the wood that was in the next room. The plaintiff then went in to see what wood was there and found a lot of old flooring and old partition about five inches wide and seven-eighths of an inch thick. One side of this lumber was painted. There were about 200 pieces of lumber in the room. The witness picked out some of this stuff for crosspieces and examined it to see if it was solid, and then he and Tempe sawed this selected lumber into proper lengths. Tempe and the plaintiff then nailed to the uprights the lumber that they had sawed, but neglected to put in braces on the crossbeams. There was a brace at either end of the scaffold. They then proceeded to place boards on top of the crosspieces. This scaffold was finished on Saturday evening and no more work was done on that day. Some time on Saturday Pickert was present and plaintiff asked him whether the scaffold was strong enough, and Pickert said, "The scaffold is strong enough." On Monday morning when the men went to work they took boards and screwed them on the ceiling, and on the boards they screwed the "hangers" with a hook upon which a shaft was to run. In the afternoon the men had completed that work and got the hangers up all ready to put the shafting on. There were then two machinists, Tempe and the witness, engaged in this work. When the shafting was lifted up on the scaffold to be put in place Pickert, the foreman, and a man named Lindstrom were present,

having been requested to help place the shaft in position. This shaft was placed upon the scaffold with the pulleys that were to be attached to it. Then Pickert and Lindstrom, the two machinists, Tempe and the plaintiff, went up on the scaffold and started to put the shafting and the pulleys on the hangers. As they started to lift up the shafting one of the crosspieces upon the scaffold broke, the whole scaffold collapsed and the plaintiff received injuries which resulted in a portion of his leg being amputated.

Upon cross-examination the plaintiff testified that he had worked at planing and joining wood for about five years before the accident, operating machines in which steam power was used; that the wood that was used in the construction of this scaffold had been brought by the defendants from their old factory, and the shafting that was put up was shafting that had been used in the old factory; that Tempe and the plaintiff built the scaffold and themselves adopted the method and the materials that were used; that there was plenty of lumber in the room from which the plaintiff selected what he used, and the only directions that were given to the plaintiff and Tempe by either the foreman or the machinists was that the plaintiff and Tempe should build the scaffold; that there was no direction from either the foreman or from any one else as to how the scaffold should be built; that was left to the plaintiff and Tempe; that they were simply directed by Pickert to build the scaffold and to take the lumber for that purpose from the next room; that "I only know that he told us that we should build the scaffold, and that we should take wood from inside; that is what I know. Inside was the third room I have spoken of," and that after having received this instruction the plaintiff said: "Now, we have to build a scaffold," to which Tempel acceded.

The plaintiff also called one of the machinists engaged in installing this machinery, who was not in the employ of the defendants, and who testified that he observed the pile of lumber from which the timbers were taken for the construction of this scaffold and that there was plenty of lumber there from which to build the scaffold; that he noticed the scaffold after it was built and that it looked all right to him. Other witnesses called by the plaintiff also testified that there was plenty of lumber upon the premises to build the scaffold, of all kinds of length, width and thickness, and that there was

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old lumber and new lumber. The plaintiff also called an expert who testified that he was familiar with scaffold building and that this scaffold, as erected, was not strong enough for the weight that was placed upon it; that it was capable of holding only about 600 pounds; that if upon such a scaffold six men were placed averaging in weight about 150 pounds, a shafting consisting of a steel rod, being two and fifteen-sixteenths of an inch in diameter and about eighteen feet long, with three pulleys, the aggregate weight of the shaftings and pulleys being 1,000 pounds, it would fall; that to make such a scaffold safe for such a weight the crosspiece, instead of being seven-eighths by four and a half inches, should have been at least seven-eighths by nine inches, and that with such additions the scaffold would have been safe; that if, instead of having a plank nine inches wide, they had used two planks each about five or five and a half inches, one under the other, that would have had sufficient strength to carry 2,000 pounds.

After the collapse of the scaffold, it was ascertained that one of the pieces of timber used to brace it had a large knot in it; that this piece of timber was broken across the knot, and that the nails used to hold the scaffold and bracings together had been pulled out. Pickert, who has been described as the foreman, testified that the installation of this machinery was under the direction of the machinists, who were not in the employ of the defendants; that he did not at any time tell the plaintiff to build the scaffold; that he gave no instructions as to how the scaffold should be built; that he did not know who built it and did not see it built; that there was a quantity of lumber, much more than was used to build the scaffold or necessary for that purpose, on the premises; that just before the accident he was in the building, when one of the machinists came and asked for two men to help lift the shafting; that the witness went down into the basement and instructed two men working there to go up and help; that one of them went with the witness to the scaffold; that when he arrived there the plaintiff and two other men were working out on the scaffold, and he went up to assist them; that none of the men asked him whether the scaffold was strong enough, and that he did not tell any one that it was; that neither of the defendants, nor any one acting for them, gave any directions as to how this machinery was to be installed; that the

plaintiff and Tempe were directed to assist the machinists, who were working under an independent contractor who had made a contract to install this machinery ; that he saw the scaffold after it was built and before the shafting was put on top of it, and that he saw how it was built and what material was in it, and that it looked all right and perfectly safe to him ; that before he got to the scaffold the plaintiff and other men were upon it and had placed upon it the shafting and pulleys ; that just before the scaffold collapsed the men started to lift up the shafting to put it in place, and as the shafting was being lifted up the scaffold collapsed.

The machinist, who had made the contract with the defendants to install this machinery, testified that he made a verbal agreement with the defendants in regard to moving and placing some machinery for them ; that the understanding was that he was to move the machinery from the old factory into the new one ; that he was to furnish two good men and the material that was needed ; that he was to do what the defendants' foreman proposed to do so as to get it running in proper shape, so that he was to set up the machinery in the new factory ; that the defendants' men were working along with his men ; that he had to set the shafting where the defendants wanted it, and that he was to do as defendants' foreman directed him to do ; that nothing was said about the building of the scaffold for the purpose of putting up any shaftings ; that the witness sent two machinists to do the work ; that the defendants or their foreman had directed where the machinery was to be placed, and the machinists employed by the witness decided as to the way in which it should be set up ; that in setting up machinery of that kind scaffolding was ordinarily used ; that the machinists employed by the witness to work upon this job were old experienced millwrights and had built scaffolds while in the witness' employ, which had been four or five years before the accident ; that it was part of the machinists' work to build scaffolds when necessary in putting up machinery.

The defendant moved to dismiss the complaint, which was denied.

Assuming that this provision of section 18 of the Labor Law to which attention has been called was applicable, the question first presented is, whether or not it was the duty of the defendants to

furnish a scaffold for the work that was thus being done, or whether they actually assumed to furnish such a scaffold, which was unsafe and in violation of the law. They had made a contract with the machinists to install this machinery; they furnished workmen to help the machinists who were engaged in performing that contract. While these men were thus employed helping the machinists defendants' foreman directed men employed by the defendants to build a scaffold, and also directed them to use the timber on the premises, and the plaintiff and his fellow-workmen proceeded with this work. The workmen selected the timber to be used and determined themselves upon the character of the scaffold and the manner of constructing it, and they completed the scaffold without any interference in any way by either the defendants or their foreman. The plaintiff's evidence tends to show that the scaffold that he constructed, assuming that it had been sound timber, was not sufficient to hold the weight that was placed upon it; but, so far as appears, neither the defendants nor their foreman had any knowledge as to the weight that it was expected to bear or the manner in which it was to be used. The defendants did not undertake to provide scaffolds for use in installing this machinery. They were not putting it in place; they had made a contract with the machinists to do that work, and their employees, the plaintiff, Tempe and Pickert, were there to assist the machinists when they required assistance, and while at this work they undoubtedly were under the orders of Pickert, but when Pickert directed them to build the scaffold to assist the machinists, who were acting under an independent contract, he was simply directing them to assist the independent contractor and not directing how the independent contractor should do his work nor was he furnishing either the plaintiff or the independent contractor with a scaffold. There was no obligation upon the defendants to provide this scaffold for the men who were engaged in installing this machinery, nor did the defendants assume such an obligation, and when the plaintiff and Tempe undertook to build this scaffold and with plenty of materials there to construct it properly and safely, determined for themselves the method of construction without direction from either the defendants or their foreman as to how it should be constructed or as to the materials to be used in its construction, it certainly cannot be said that these defendants built the

scaffold or furnished it for the plaintiff's use. So far as appears, the plaintiff and Tempe knew as much about scaffold building as either the defendants or Pickert, their foreman. The machinists who were at work in the building were competent men and used to the business of constructing scaffolds for use in installing machinery. They certainly knew much more about it than either the defendants or their foreman. As the accident was caused by the improper construction of the scaffold or to the use to which it was put or the selection of the materials by the plaintiff and his fellow-workmen they and not the defendants are responsible. The statute provides that "a person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper." And it is only the person who furnishes or erects or causes to be furnished or erected an unsafe or unsuitable or improper scaffold to or for his employees who is guilty of a violation of this statute. I take it if these defendants were indicted for a misdemeanor under section 155 of the Penal Code for a violation of this statute that upon this evidence no conviction would be allowed. When the scaffold collapsed because the men who built it failed to select the proper material or to sufficiently strengthen it, the accident was caused, not by the failure of the defendants to perform any duty devolving upon them to perform, or which they had assumed to perform, but because the plaintiff and his fellow-workman improperly did the work which they were instructed to do, and the accident was, therefore, wholly due to the negligence of the plaintiff and his fellow-workman.

It follows that the judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellants to abide the event.

VAN BRUNT, P. J., and McLAUGHLIN, J., concurred; O'BRIEN and HATCH, JJ., dissented.

O'BRIEN, J. (dissenting):

I dissent. It is assumed that by force of our prior decision the defendants would be liable if they erected or caused to be erected

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the scaffold in question. Although plaintiff and his witnesses testify that defendants' foreman Pickert told them to erect the scaffold, and while it must be conceded that Pickert was the *alter ego* of and represented the defendants, yet it is said the latter can escape liability because testimony is given tending to show that defendants had a contract with some machinist who in erecting the machinery was under a contract to furnish the appliances necessary for such construction which would include a scaffold if needed.

This seems to me to be immaterial because it was not shown that plaintiff knew or had reason to know of any such contract with the machinists, and the fact that Pickert directed plaintiff to assist in the erection of the scaffold and told him where he could get the lumber, negatives the inference that he was a mere volunteer or gratuitous helper in something which did not relate to his employment.

It would be a novel proposition if a servant directed to do a particular thing should instead of obeying the master inquire if it was not some one else's duty to do it. What difference legally can it make whether somebody else did or did not agree with the master to do it, if the latter directs his employees to do it. Nor am I impressed with the evidence in support of such a defense. It would appear to have been an afterthought, or such the jury might have concluded, because on its face it is incredible that one who employed an independent contractor to do the work should, at his own cost, furnish the labor and material necessary for the construction of the scaffold.

In my opinion the most serious question is whether under the law an employer is liable for injuries suffered by an employee on a scaffold which the employee himself builds, the master having furnished a sufficiency of the material from which it could be safely built. This question, I think, must in part turn upon a consideration of whether or not the employee did or did not know how to build a safe scaffold.

Here the plaintiff was not a scaffold builder and the evidence tends to show that even if sound timber had been used it would not have averted the accident for the reason that it was not sufficiently braced to hold the weight that was placed upon it. It is said by Justice INGRAHAM that "so far as appears neither the defendants

nor their foreman had any knowledge as to the weight that it was expected to bear." And again, "the plaintiff and Tempe knew as much about scaffold building as either the defendants or Pickert, their foreman."

Here again I think Justice INGRAHAM begs the question, his whole discussion proceeding upon a theory which might well apply if this were a question between the contracting machinist and the defendants. As between them it may be true that "defendants did not undertake to provide scaffolds for use in installing this machinery."

But how can all this affect the liability of the plaintiff? The latter, without knowledge of the relations between the defendants and the machinist, was told to work on a scaffold by defendants, and this scaffold was unsafe and insecure, and he was injured. Under the law this made them liable, unless the fact to which we have adverted, that the plaintiff had a part in the selection of the lumber and in the labor that was expended in erecting the scaffold, would change the rule. Section 18 of the Labor Law provides that "a person employing * * * another to perform labor * * * shall not furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding * * * which are unsafe, unsuitable or improper and which are not so constructed, placed and operated as to give proper protection to the * * * person so employed or engaged." This imposes an obligation which cannot be delegated, and I do not think that the responsibility which is thus placed on the master by the law is discharged by having a scaffold built by incompetent men, though in his employ, and then, when one of them is injured while working on what is shown to have been an improperly constructed scaffold, that the master can escape because the man injured was one whom the master directed to construct the scaffold. If the master causes the erection of an "unsafe, unsuitable or improper" scaffold, and directs his employees to use it, he is liable if one of them is injured by reason of the defective construction.

I am for affirmance.

HATCH, J., concurred.

Judgment and order reversed and new trial ordered, costs to appellants to abide event.

BERTHA SMITH, Appellant, v. GUSTAV E. KISSEL, Respondent.

Contract to share in the profits of a purchase of real property — oral agreement by one party to give his interest therein to the other, who assumed the incumbrances on the property — enforced against the party transferring his interest and against his undisclosed assignee.

John B. Smith, who had contracted to purchase certain premises for \$140,000, \$15,000 to be paid in cash and \$125,000 by a mortgage upon the premises, made a proposition to one Kissel that if the latter would procure the amount of the cash payment, by obtaining a loan on the security of a second mortgage upon the property, the purchase should be made for their joint account as copartners. Kissel accepted the proposal and procured the loan. The property was thereupon conveyed to Smith and he executed to the grantors a first mortgage for \$125,000 and a second mortgage to secure the loan procured by Kissel.

Thereafter Smith, for private reasons of his own, conveyed the property to one of Kissel's clerks. Subsequently an action was brought to foreclose the second mortgage, which was held by Kissel's brother. Smith thereupon went to Kissel and informed him that the foreclosure of the second mortgage was embarrassing him, and that if Kissel would take care of the mortgages, Smith would, in consideration thereof, release him from any claim of any interest in the profits realized upon the sale of the premises. Kissel, in reliance upon Smith's promise, paid off the incumbrances upon the property and subsequently sold it at a profit.

Prior to the arrangement between Smith and Kissel, by which Smith terminated his interest in the contract, Smith assigned his interest therein, but Kissel had no notice thereof.

Held, that the arrangement between Smith and Kissel, by which the former released his interest in the property, was based upon a valuable consideration, and was binding upon Smith's assignee.

APPEAL by the plaintiff, Bertha Smith, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 6th day of July, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the plaintiff's complaint upon the merits.

C. Elliott Minor, for the appellant.

Richard L. Sweezy, for the respondent.

INGRAHAM, J. :

The action was brought for an accounting.

The complaint alleged that on the 16th of July, 1896, one John B. Smith purchased certain property in the city of New York for the price of \$140,000, of which \$15,000 was to be paid in cash upon delivery of the deed, and the balance by execution and delivery of a bond secured by a mortgage upon the property; that Smith, being desirous of raising \$15,000 with which to make the cash payment, applied to the defendant to loan him the money; that the defendant stated that he would procure a loan of that sum to be secured by a second mortgage upon the property, and in consideration of the defendant procuring such loan, the defendant demanded of Smith that he be allowed to join with Smith in the purchase and sale of the said property as his partner in reference thereto, and that the rents and profits to be derived therefrom should be equally divided between them; that the defendant subsequently secured a loan of the money, which was secured by a bond and mortgage on the property, and that in consideration thereof "it was agreed by and between said John B. Smith and the defendant that said purchase should be for their joint and partnership account, and that they should be equally interested therein, and should divide the profits and proceeds thereof realized from a sale by them or either of them of said property equally, share and share alike."

The answer denies these allegations and alleges that the said Smith applied to the defendant for a loan of \$15,000 to enable him to complete the purchase of certain property described in the complaint; that upon procuring the said loan said Smith agreed to enter into a contract to purchase said property, which purchase should be for the joint account of said Smith and defendant; that the defendant agreed to said proposal and procured the said loan, whereupon Smith entered into a contract to purchase the property; that on or about July 17, 1896, the property was conveyed to Smith, Smith executing to the grantors a first mortgage to secure the payment of \$125,000, a part of the purchase price; that the loan procured by the defendant of \$15,000 was used to pay the amount required to be paid in cash upon the completion of said purchase, and that this amount of \$15,000 was secured by a second mortgage upon the premises, which was payable on or before July 17, 1897; that on or about January

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21 or 22, 1897, Smith conveyed the premises to a clerk in the employ of the defendant; that subsequent to said conveyance Smith endeavored to find a purchaser for the premises without success, until some time in February or March, 1897, when Smith stated to the defendant that he was unable to procure a purchaser for the premises, and he then and there agreed to dissolve the said joint interest and account existing between Smith and the defendant and agreed that the premises should be the sole property of the defendant, the defendant to pay the amount of \$15,000, the loan procured by the defendant for Smith and that there should be no further accounting as to the rents of the property that had been received by Smith or the defendant, or on account of the agreement to divide the profits.

Upon the trial it appeared that on the 17th day of July, 1896, Smith received a deed of the property and executed to the vendor a purchase-money mortgage to secure the sum of \$125,000, a part of the purchase price, and at the same time executed a second mortgage to Charlotte A. Kissel to secure the sum of \$15,000 which became due on July 17, 1897; that this money was paid to Smith to enable him to complete his purchase of the property; that subsequently Charlotte A. Kissel died, whereupon her executors transferred the said mortgage to Rudolph H. Kissel on February 9, 1897. On January 22, 1897, Smith and wife conveyed the premises in question to Bashford, a clerk in the employ of the defendant, and it was conceded that that was a conveyance for the benefit of defendant. Smith testified that from the 1st of December, 1896, to the 1st of January, 1897, he had collected all the rents of the property and that subsequently the defendant sold the property. The plaintiff then rested, whereupon the defendant testified that he had no knowledge that the plaintiff had any interest in the contract or the property until the commencement of the action; that some time early in 1896 Smith applied to the defendant for a loan of \$15,000 to make a cash payment for the purchase of this property; that Smith stated to the defendant that if the defendant would procure that loan he (Smith) could sell the property within six months, would attend to the management and sale of the property and would divide with the defendant the profits that he received in the transaction, and that at that time Smith wrote the defendant a letter which was introduced in evidence, as follows:

"MY DEAR SIR.—In consideration of your procuring \$15,000 from Charlotte A. Kissel to contribute towards the purchase of the Grace Church property, (13th to 14th Streets), I will divide with you all profits.

"Yours very truly,
"J. B. SMITH."

He also testified that Smith and the defendants had interviews from time to time in relation to the sale of the property at which Smith stated that he was doing his utmost to sell it; that these interviews continued until January, 1897, when Smith came to the office of the defendant and said that for private reasons he wanted this property put in the hands of some one else; that one of the defendant's clerks would do; that he wanted the property transferred at once — within twenty-four hours — whereupon the defendant called up an attorney, and the property was conveyed by Smith to Bashford, one of the defendant's clerks; that Smith still continued his efforts to procure a purchaser for the property. After this second mortgage became due proceedings were commenced to foreclose it, and while that action was pending, some time in February or March, 1898, Smith came to the defendant and said that he was in trouble; that the defendant was having the mortgage foreclosed. To this the defendant replied that the mortgage belonged to his brother and that he was conducting his own affairs, to which Smith replied, "Well, * * * you can control it," to which the defendant said, "That is possible; I can control it by paying it." Smith said, "What are you doing this for? * * * You have got everything that you can get by a foreclosure, and what do you want to keep on for? * * * Why do you want to keep on? You have got everything; you have got the title in your own name. You have controlled this mortgage, and, if you foreclose it, what are you doing it for? I have had a great deal of trouble, and it will only add further harm and trouble. * * * This thing is all ended," to which the defendant replied, "I am doing it to get an undisputed title to this property, because now I have to bear the burden. You are out of it, and under those circumstances I want to be sure of my title," to which Smith said, "How can you be more sure of your title than you are now? You own the thing; you own the mortgage. I can't do anything more, and why don't you stop?" That Smith further said that he would

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call it square if the defendant "will take care of the mortgage." That the defendant reminded Smith of the fact that the burden was coming along; that it was a very great one; that this first mortgage of his became due in six months, that the second mortgage was due, and then said to Smith: "You can't do anything here. You tell me yourself that you have no money, that you are insolvent;" that "under those circumstances this is no longer a joint account," and Smith replied: "That is perfectly true. I don't want any more interest in the thing, but there is no necessity of anything between us; you have got it now;" that Smith then abrogated the contract which was only a verbal one between the parties, and the defendant accepted the abrogation in consideration of his letting Smith off from further annoyance, the defendant to take care of the mortgages; that the mortgages were taken care of by the defendant, and Smith took no further interest in the property until the suit was commenced; that at the time of this conversation there was no negotiation pending for the sale of the property. After this contract the defendant entered into negotiations for the sale of the property and subsequently made a contract with the purchaser to sell the property for \$165,000. To complete that contract the defendant paid the second mortgage of \$15,000 and also the first mortgage for \$125,000, and then procured a new mortgage upon the property for \$100,000, paying the difference in cash, and also paying the charges, commissions for obtaining the loan and unpaid taxes; that he advanced \$32,000 in cash to put the thing through and received the difference between the amount that he had procured on the property and the purchase price of the property in a second mortgage upon the property made by the purchaser; that he made these payments entirely relying upon the agreement with Smith, that Smith released all claim against the agreement to divide the profits, and without knowledge of any assignment by Smith to the plaintiff, treating the whole transaction as a complete abrogation of the agreement between himself and Smith to divide any of the profits realized upon this transaction.

It is quite apparent that the real consideration for Smith's release of this interest in the property was the agreement by the defendant to release Smith from any obligation that he was under in relation to the mortgages then upon the property and by which the defend-

ant assumed these obligations and agreed to furnish the money necessary to protect the property. When the agreement for the division of the profits was made Smith owned the property. He subsequently conveyed it to the defendant's clerk, and the fact that shortly afterwards judgment was entered against Smith explains this conveyance. Undoubtedly this conveyance would not change the legal obligation of the defendant to account to Smith for any profits subsequently realized in the disposition of the property; but when Smith came to the defendant and stated that he could do nothing further in relation to it; that the foreclosure of the mortgage for \$15,000 was embarrassing him and requested the defendant to take care of the mortgages, and in consideration thereof that he would release the defendant from all claim for any interest in the profits, the defendant accepting that in good faith, and subsequently paying off the mortgages upon the property, the consideration for Smith's release of his interest in the profits was the obligation assumed and carried out by the defendant of providing the money necessary to pay the incumbrances upon the property and his subsequently paying off these mortgages, was certainly a valuable consideration for Smith's release of his right to any portion of the profits. There was no possible defense by Smith to the foreclosure of the mortgage for \$15,000. The defendant has assumed no obligation as to it, and if that foreclosure had been carried out and the property sold, it is quite clear that Smith would have had no further interest in the transaction. Smith had been unable to effect a sale of the property, and there were then no profits to which he would have been entitled; and there is not the slightest evidence to show that at the time of this transaction there was any offer for the property, or negotiations for its sale. Assuming that this account of the transaction by the defendant was true, there was a perfect valid agreement by which Smith's interest in the property was discharged, and the defendant acting upon that agreement, discharging Smith from all liability upon his obligations, terminated Smith's relation to the property and any rights that he would have under his agreement with the defendant. There was no obligation upon the defendant to make these large payments that were necessary to pay the mortgage on the property, and he paid these mortgages relying upon Smith's agreement to abrogate their understand-

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ing as to the division of the profits. Upon the performance by defendant of this agreement Smith's right to any future interest in the profits was at an end.

The plaintiff produced an assignment of Smith's right under this agreement with the defendant dated April 2, 1897. This was some time before the arrangement between Smith and the defendant by which Smith terminated his interest in the contract. The evidence is clear that the defendant had no knowledge of this transfer. The plaintiff gave him no notice of it and the defendant continued to treat Smith as the principal and relying upon Smith's undertaking made these payments and relieved Smith from his obligations upon the mortgages. There can be no question but that in the absence of knowledge of the assignment the plaintiff was justified in treating Smith as the person entitled to whatever rights there were under the contract, and the plaintiff, therefore, is bound by the act of Smith, her assignor, in releasing the defendant from any obligation under the contract in relation to the profits to be realized from the sale of this property. It is true that Smith denies that he made this agreement with the defendant, but the court has found in favor of the defendant upon satisfactory evidence, and we are not justified in interfering with the findings by the trial court. It is quite clear that by this agreement Smith, for a valuable consideration, released the defendant from any obligation to account for the subsequent profits realized from a sale of the property, and that this agreement being found, the court below was right in dismissing the complaint.

It follows that the judgment appealed from must be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Judgment affirmed, with costs.

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CHARLES W. PURDY, Appellant, v. RICHARD K. BAKER, Respondent.

Stay of proceedings in one action not proper in another — an injunction may in a proper case be granted.

Where an action brought in the Supreme Court in Schuyler county by Baker against one Purdy, and an action at law brought in the Supreme Court in the county of New York by Purdy against Baker are both pending at the same time, a motion made by Purdy in the New York county action for an order staying proceedings in the Schuyler county action is properly denied; such a motion must be made in the Schuyler county action.

Semble, that in a proper case the court might entertain an application for an injunction in one suit to restrain the proceedings in another.

APPEAL by the plaintiff, Charles W. Purdy, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 15th day of January, 1904, denying the plaintiff's motion for a stay of proceedings in an action brought by Richard K. Baker, the defendant herein, against the plaintiff in the county of Schuyler.

William C. Wolf, for the appellant.

Seaman Miller, for the respondent.

INGRAHAM, J. :

It is quite clear that the court properly denied this motion, as any application to stay the proceedings in the action brought in Schuyler county must be made in that action. The motion is not for an injunction to restrain the defendant from proceeding in another action, which the Supreme Court would in a proper case have jurisdiction to grant, but simply an application made for an order staying proceedings in another action. This action is one at law, brought to recover damages for a breach of a contract. No equitable relief is asked, and the court is asked to exercise none of the powers of a court of equity.

Actions for an accounting in which a court of equity had jurisdiction over all the parties interested in a fund in the hands of trustees, or where the court has power by its process to bring all the parties interested in the fund before it, and to determine all their rights, are not in point. There, the court, by virtue of its equitable power, requires all persons interested in the fund to come

in as parties to the action and enjoins them from instituting other actions against the trustee, as all their rights can be protected by the decree in the equitable action. No such relief is asked in this case. Here the two actions are in the Supreme Court, but in different counties. All motions in the action in Schuyler county must be made in that action, and not in another action pending in New York county. All of the cases cited by the plaintiff were either actions in equity in which the court had before it all the parties interested and where the proceeding was to determine the rights of the several parties to a specific fund or specific property, or where the motion to stay the proceedings was made in the action, the proceedings in which were stayed. The Supreme Court in Schuyler county can determine whether or not that action should be tried before this action, and the determination of that question should be left to that court.

For this reason, I think, the order appealed from should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN T. STEPHENSON, Relator, v. FRANCIS V. GREENE, as Police Commissioner of the Police Department of the City of New York, Respondent.

Trial of a police captain — evidence insufficient to establish that he permitted disorderly houses to exist or that he failed to report suspicious places — what are "suspicious places."

In reviewing, pursuant to a writ of certiorari, the action of the police commissioner of the city of New York in dismissing a police captain after a trial on charges, it is the duty of the Appellate Division to determine in the first instance whether there was any competent proof of all the facts necessary to be proved to justify the conviction, and if so, then to determine whether there was such a preponderance of evidence against the determination of the commissioner as would necessitate setting aside the verdict of a jury as against the weight of evidence, had a jury found the existence of such facts in an action in the Supreme Court.

Evidence that on a single occasion strangers were able to obtain admission to a hotel without difficulty, and found therein women ready to participate in immoral acts, is not sufficient to establish that the house was a disorderly one where common prostitutes resorted and resided.

The rule of the New York police department requiring police captains to report the "location of all suspicious places and places where it is suspected that violations of the law are planned or occur," and which is silent as to what constitutes a "suspicious place," contemplates that the determination of that matter shall be left to the judgment and discretion of the police captain; such judgment and discretion must be founded upon evidence and not upon a mere whim or caprice on the part of the police captain.

CERTIORARI issued out of the Supreme Court and attested on the 3d day of March, 1903, directed to Francis V. Greene, as police commissioner of the police department of the city of New York, commanding him to certify and return to the office of the clerk of the county of New York all and singular his proceedings had in removing the relator from the police force of the police department of the city of New York.

Frank S. Black, for the relator.

Terence Farley, for the respondent.

McLAUGHLIN, J.:

The relator, a police captain assigned to duty in the eleventh precinct in the city of New York, was, on the 9th day of December, 1902, charged by the police commissioner and by the senior police inspector with (1) conduct unbecoming an officer; (2) conduct injurious to the public peace and welfare; (3) neglect and disobedience of orders and of the rules and regulations of the police department; (4) neglect of duty; (5) making false reports under rule 44, paragraph B.

The charges contained three specifications, which were, in substance, (1) that from the 6th day of August, 1902, to the date the charges were made he suffered and permitted six houses of prostitution, the street numbers of which were given, to be kept and maintained in the district to which he was assigned; (2) that during the same time, at four places, the street numbers of which were given, he permitted persons to traffic in intoxicating liquors without a liquor tax certificate, in violation of subdivision 1 of section 11 of the Liquor Tax Law (See Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312);

(3) that during the same time he "had reasonable grounds for suspicion" that violations of law were occurring and were planned to occur at eight places, designated by street numbers, and that it was his duty, under the rules and regulations of the police department, to report them as suspicious places in the monthly reports made by him for September, October, November and December, which he failed and neglected to do, and thereby concealed from his superior officers the fact that such places were suspicious.

Upon the charges stated, as supplemented by the specifications indicated, the relator, after a trial had before the first deputy commissioner, was found guilty and by the police commissioner dismissed from the police force. The relator thereupon obtained a writ of certiorari for the purpose of having the proceedings which resulted in his dismissal reviewed by this court. The Code of Civil Procedure gives him the right to this review (Chap. 16, tit. 2, art. 7), and it also limits the review to certain questions, among which is a determination of whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination, and if so, whether there was "upon all the evidence such a preponderance of proof against the existence of any of those facts that the verdict of a jury affirming the existence thereof rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court as against the weight of evidence." (Code Civ. Proc. § 2140.) It is our duty, therefore, in reviewing the proceedings, to determine in the first instance whether there was any competent proof of all the facts necessary to be proved to justify the conviction, and if so, then to determine whether there was such a preponderance of evidence against the determination of the commissioner as would necessitate setting aside the verdict of a jury as against the weight of evidence, had a jury found the existence of such facts in an action in the Supreme Court. (*People ex rel. McAleer v. French*, 119 N. Y. 502.)

Mindful of the duty thus imposed, we have carefully examined the record, and after such examination the court is unanimously of the opinion that the findings of the commissioner are so manifestly against the weight of evidence that the same must be set aside.

Having reached this conclusion, it would serve no good purpose to set out at length the evidence bearing upon such charges, except

in so far as the same relate to one house, No. 73 Elizabeth street, it being strenuously urged that as to this house at least the evidence was sufficient to justify the relator's dismissal. It is sufficient to say that the evidence did not establish that houses of prostitution had been kept and maintained at the times and places stated, or that there had been any dereliction of duty on the part of the relator with reference to such houses. And as to the illegal sales of liquor, the evidence established at most a mere technical violation, for which it would be unreasonable and unjust under the facts proved to hold the relator guilty of neglect of duty because he did not prevent them.

As to the commissioner's findings in so far as the same relate to 73 Elizabeth street. It will be borne in mind that the charges in this respect were that it was a house of prostitution which the relator suffered and permitted to exist during the time stated and that he made false reports with reference thereto in that he did not characterize it in the monthly reports made by him for September, October, November and December as a suspicious place. As to the character of the house seven witnesses were produced, six of whom were detectives connected with the district attorney's office, and the seventh a police officer (none of them under the control of the relator), who testified, in substance, that on the twentieth-sixth of November they, without difficulty, gained admittance to 73 Elizabeth street; that upon entering the place they were met by a woman, apparently in charge, who, upon being informed of what they desired, directed them to go to the floor above where several women were found ready to participate in immoral acts; that they made but one visit to the place and there was nothing in the external appearance of the building which indicated that it was a disorderly house, or that illicit practices were being conducted in it, nor did the dress of the women whom they saw indicate that they were prostitutes. It did not appear when these women entered the place how long they remained, whether they or women of like character had been there before or went there thereafter. The evidence, therefore, at most simply established that on a single occasion in a hotel, strangers, so far as appearances were concerned, were able to obtain admission to the building without difficulty and obtain therein women for immoral purposes. This fell far short of establishing that the

house was a disorderly one where common prostitutes resorted and resided (*Barnesciotta v. People*, 10 Hun, 139; *Commonwealth v. Lambert*, 12 Allen, 177; *People v. Gastro*, 75 Mich. 127; *People v. Pinkerton*, 79 id. 110; *State v. Lee*, 80 Iowa, 75; *State v. Gar- ing*, 74 Maine, 152), and the finding that it was a house of this character which the relator suffered and permitted to be maintained is not sustained by the evidence.

This brings us to a consideration of the second branch of the inquiry, and that is, whether the relator was guilty of making false reports under rule 44, paragraph B, with reference to this house, in that he did not designate it in his reports as a suspicious place. This rule, in so far as the same is material to the question under discussion, provides that captains of the police force shall make, sign and transmit monthly reports in duplicate, one copy to the police commissioner and one copy to the first or second deputy, stating the following among other things: "4. Location of all suspicious places and places where it is suspected that violations of the law are planned or occur." The rule is silent as to what constitutes a "suspicious place," but it is fair to assume that the same is to be determined by the exercise of good judgment and discretion on the part of the captain of the precinct, since he is required to make the report. Such judgment and discretion, however, are not a mere whim or caprice upon his part, but must have for their foundation some evidence. Otherwise, it is not difficult to see how reputations might be seriously injured and the value of property easily depreciated. This seems to have been the view entertained by the police department, because in this connection it appeared that the relator, prior to the time the charges were preferred against him, asked his superior officer — Inspector Brooks — what constituted a "suspicious place," to which the inspector replied: "He thought the Captain of the precinct should be the better judge of that; that he should be guided by the reports made to him by detectives and officers doing duty in citizens' clothes and his personal visits to the place, whether or not it should be termed a suspicious place." The relator himself testified that he had always considered it necessary for a captain to obtain some evidence that the law was being violated at a place, before entering it upon his list as suspicious, and that was the way he had always been guided as a captain of police.

Here there is no evidence, as it seems to me, which would have justified the relator in characterizing the place in his reports for the months stated as a suspicious one. It is true he had been told by his superior officer that complaints had been made that the house was disorderly, and he had been asked as early as August to investigate such charges and make a report, which he did, and in which he stated: "No. 73 Elizabeth Street is a four story building, which is a duly licensed hotel and is conducted by one Florino Capparelli. Owing to the number of complaints received against said premises, which is patronized almost exclusively by Italians, I have caused the members of my command detailed to duty in plain clothes to frequently visit the same at irregular hours of the day and night, and I have also made personal inspections of said place, and while it is barely possible that technical violations of law may occur thereat, I have been unable up to the present to secure any evidence which would justify me in taking any action against the proprietor thereof." It also appeared that the relator detailed, from time to time, at least ten different police officers to make an investigation and report, seven of whom testified, in substance, that under the direction of the relator they visited the house frequently, in various disguises, at different hours of the day and night; one of them stated that he gained admittance to the building from an adjoining roof, while another that he secreted himself within the building for a short period of time, and all of them stated that they were unable to discover any evidence that it was a disorderly house or that disorderly practices were carried on in it; the other three were present at the trial, ready to be sworn, and it was conceded that their testimony would corroborate the testimony given by the other officers, showing active vigilance on the part of the relator to determine the character of the house and enforce the law with reference to its inmates, and his inability to obtain any evidence against it. In corroboration of these witnesses at least five others were produced, who testified, in substance, that some or all of them lodged in the building from about the first of September to the first of December, and they never saw any disorderly acts committed, nor any women in the house except one who did the cleaning. The relator himself testified that he had made personal inspections, and he detailed at length the efforts which he had made through the officers under his

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command, employing "stool pigeons," obtaining officers from other precincts, and that he was unable to obtain any evidence which would have justified him in taking proceedings against the proprietor or reporting the house as a suspicious one.

Under such circumstances I do not think it can be said that the reports which he made were false, and the finding of the commissioner that they were is against the preponderance of evidence.

In conclusion, therefore, it seems to me that the findings of the commissioner, judging the relator guilty of the charges made against him, are against the weight of evidence, and for that reason the same should be set aside, the writ sustained and the relator reinstated in his former position, with fifty dollars costs and disbursements.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred.

Proceedings annulled, writ sustained and relator reinstated, with fifty dollars costs and disbursements.

THOMAS R. McMANN, Respondent, v. EDWARD A. BROWN,
Appellant.

Dismissal of an action for a failure to prosecute it — when it is proper.

Upon a motion, made September 18, 1903, to dismiss a complaint for a failure to prosecute the action, it appeared that issue was joined therein August 21, 1900; that a note of issue was filed on the 22d day of August, 1902, but that no notice of trial was served until October, 1903, after the motion to dismiss the complaint had been made. No excuse was given for the delay except the bare statement that through "inadvertence" the notice of trial was not sooner served.

Held, that the excuse offered did not furnish any basis whatever for the exercise of judicial discretion and that the motion, to dismiss the complaint for a failure to prosecute the action within section 822 of the Code of Civil Procedure and rule 86 of the General Rules of Practice, should be granted.

APPEAL by the defendant, Edward A. Brown, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 1st day of December, 1903, denying the defendant's motion to dismiss the plaintiff's complaint.

Philip A. Rorty, for the appellant.

C. F. Goddard, for the respondent.

McLAUGHLIN, J. :

Defendant appeals from an order denying a motion to dismiss the complaint on the ground that plaintiff has unreasonably neglected to prosecute the action. Issue was joined in the action on August 21, 1900. The motion was made September 18, 1903. The facts upon which defendant claimed that he was entitled to have the complaint dismissed are similar to those stated in *Fisher Malting Co. v. Brown* (92 App. Div. 251), and it is, therefore, unnecessary to restate them. In the affidavit of the plaintiff's attorney used in opposition to the motion the statement is made that a note of issue was filed on the 22d day of August, 1902, but the fact is not denied that no notice of trial was served until October, 1903, and until after the motion to dismiss was made. The note of issue filed was ineffectual because the action had not then been noticed for trial. (Code Civ. Proc. § 977.) No excuse was given for the delay, except the bare statement that through "inadvertence" the notice of trial was not sooner served. If the mere statement of "inadvertence" is to be treated as furnishing an adequate excuse for delay of over three years, then section 822 of the Code of Civil Procedure and rule 36 of the General Rules of Practice serve little purpose. Such a statement alone furnishes no basis whatever for the exercise of judicial discretion. No excuse for the neglect to prosecute the action was given by plaintiff, and for the reasons stated in the opinion delivered in *Fisher Malting Co. v. Brown* (*supra*) the motion to dismiss the complaint should have been granted.

It follows, therefore, that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion to dismiss granted, with costs of the action and ten dollars costs of the motion.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion to dismiss granted, with costs of action and ten dollars costs of motion.

FISHER MALTING COMPANY, Respondent, v. EDWARD A. BROWN,
Appellant.

Dismissal of an action for a failure to prosecute it — when it is proper.

Upon a motion made September 18, 1903, to dismiss a complaint for a failure to prosecute the action, it appeared that issue was joined therein August 21, 1900; that no further steps were taken until after the motion to dismiss the complaint had been made; that the plaintiff's attorney then noticed the case for trial and filed a note of issue.

Held, that the defendant had established a *prima facie* case of unreasonable neglect to prosecute the action within section 822 of the Code of Civil Procedure and rule 36 of the General Rules of Practice, and that, in the absence of any explanation of such neglect by the plaintiff, the motion should have been granted.

APPEAL by the defendant, Edward A. Brown, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 1st day of December, 1903, denying the defendant's motion to dismiss the plaintiff's complaint.

Philip A. Rorty, for the appellant.

C. F. Goddard, for the respondent.

McLAUGHLIN, J. :

This action was commenced in May, 1900, by the personal service of a summons and complaint, and issue was joined therein by the service of an amended answer on the 21st of August, 1900. No further steps appear to have been taken until on September 18, 1903, a motion was made, which resulted in the order appealed from, to dismiss the complaint upon the ground that the plaintiff had unreasonably neglected to proceed in the action. The plaintiff's attorney then noticed the cause for trial and filed a note of issue. The motion was denied and defendant appeals.

The fact is uncontradicted that after issue had been joined the plaintiff for upwards of three years did nothing whatever to bring the action to trial, and in the meantime younger issues have been tried in their regular order. These facts, under section 822 of the Code of Civil Procedure and rule 36 of the General Rules of Practice, made out a *prima facie* case of unreasonable neglect to pro-

ceed in the action. Unreasonable neglect having been shown, the burden of excusing the same was thrown upon the plaintiff, but in the affidavit used in opposition to the motion no explanation whatever was either given or attempted. The statement is there made that the action is upon the general calendar and that a notice of trial has been served on behalf of the plaintiff for the first Monday of November, 1903, but the fact is not denied that the notice of trial was served after the motion was made to dismiss and the action could not have got upon the calendar until such notice was served. (Code Civ. Proc. § 977.) These acts, therefore, do not tend in the slightest degree to excuse, and have no bearing whatever upon the neglect for which the defendant asked to have the complaint dismissed. The facts being uncontradicted and no explanation given for the delay, we think the motion should have been granted. The defendant fairly established a *prima facie* case of neglect on the part of the plaintiff to proceed with the action within section 822 of the Code and rule 36 above cited. (*Seymour v. Lake Shore & M. S. R. Co.*, 12 App. Div. 300; *Zafarano v. Baird*, 80 id. 144.)

It follows, therefore, that the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion to dismiss be granted, with costs of the action and ten dollars costs of the motion.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion to dismiss granted, with costs of the action and ten dollars costs of motion.

THOMAS K. EGBERT and GEORGE W. CASE, Respondents, v. THE HANFORD PRODUCE COMPANY, Appellant.

Sale of merchandise — when representations of the vendor as to its quality constitute a warranty — effect of ordering further installments after the first has been found to be unsatisfactory.

Where, at the time of a sale of merchandise, its quality is known to the vendor, but not to the vendee, and the latter is unable to inspect it, the representations made by the vendor as to the quality of the merchandise are to be regarded as a warranty.

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Consequently, where a corporation having in its storehouse at Sioux City, Iowa, a quantity of eggs, sells five carloads of such eggs in the city of New York to persons who had no representative at Sioux City, and were, therefore, unable to inspect the eggs, a representation made by the corporation that the eggs are of a certain quality constitutes a warranty.

In such a case the vendees may order the entire five carloads of eggs, and, if there has been a breach of the warranty as to quality, recover from the vendor the difference between the amount which they realized on the sale of the eggs and the amount which they would have realized had the quality thereof been as represented.

The fact, therefore, that when the first carload of eggs was delivered, the vendees found that they were not of the quality represented, and that notwithstanding this knowledge they subsequently ordered the shipment of the other carloads, which also proved to be unsatisfactory, does not deprive the vendees of their right to recover damages for the breach of the warranty.

The fact that the quality of the first carload was not as represented would not justify the vendees in refusing to receive the other carloads, it appearing that the eggs were composed of five separate lots, which were separately insured, and were represented by five distinct warehouse receipts.

APPEAL by the defendant, The Hanford Produce Company, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 11th day of May, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 13th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

George C. De Lacy, for the appellant.

Charles I. McBurney, for the respondents.

McLAUGHLIN, J.:

This action was brought to recover damages for an alleged breach of warranty in the sale and delivery by defendant to the plaintiffs of a quantity of eggs.

The material allegations of the complaint upon which a recovery was sought were that the defendant, an Iowa corporation, on or about the 20th of April, 1899, offered to sell to the plaintiffs for \$9,000 five carloads of eggs, which it warranted to be selected storage eggs, a quality known to the trade as storage firsts; that the plaintiffs, relying upon this warranty and believing the same to be true, purchased five carloads consisting of 60,000 dozen, for which they paid the price asked by defendant; that the same did not come

into plaintiffs' possession at the time of the purchase nor when payment was made, but were held by defendant as warehouseman of these plaintiffs at Sioux City, Iowa; that thereafter plaintiffs directed defendant to ship the same to their place of business in the city of New York, which it did, and upon inspection it was ascertained that the eggs were not selected storage eggs of the quality warranted and known to the trade as storage firsts, but were of a much inferior quality, of which fact defendant was immediately notified, and at the same time plaintiffs offered to return the eggs to the defendant or dispose of them as it might direct; that the defendant refused to receive the eggs or give any directions as to their disposition, and they were thereupon sold in the open market, previous notice of such sale having been given to the defendant; and judgment was demanded for the difference between what they brought on such sale and what they would have brought had they been of the quality represented.

The answer admitted the sale; payment of the purchase price; that the eggs were stored, after the purchase, by defendant in its cold storage warehouse at Sioux City, Iowa, and warehouse receipts issued therefor; and denied the other material allegations of the complaint; as a separate defense alleged that at the time stated in the complaint the defendant sold to the plaintiffs, at the price stated therein, 60,000 dozen of "fancy selected eggs in storage," and at plaintiffs' request the same were placed in cold storage "to await the orders and disposition of the plaintiffs concerning the same;" that the eggs having been put in cold storage the defendant issued its warehouse receipts covering the same; that said eggs were at the time of the sale and deposit of the kind, character and quality called for by the contract of sale; that they remained in defendant's cold storage warehouse until the 25th day of November, 1899, at which time and at sundry dates thereafter prior to the 8th day of January, 1900, defendant, at plaintiffs' request, shipped all of said eggs in five separate carloads to plaintiffs in the city of New York, and that if at the time of the receipt by plaintiffs said eggs did not grade as fancy selected eggs it was through no fault of defendant, but was due entirely to the length of time during which plaintiffs had kept said eggs in storage.

Upon the issue thus formed the parties went to trial, where sub-

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stantially the only fact litigated was whether the eggs were of the quality represented at the time the purchase was made. There was no real dispute as to the terms of the contract. The eggs sold were five carloads of selected storage eggs. The contract was made in April, when the storage of eggs begins, and was for selected eggs, known as storage firsts. This was not only established by the witnesses on the part of the plaintiffs, but by the invoice, the warehouse receipts, and also by the defendant's witness Hanford, the person who made the sale, who testified that they were to be "fancy selected eggs in storage;" that they "were to be the usual high quality of Hanford storage eggs;" as well as by the testimony of the president and warehouseman of the defendant (which was taken by commission) to the effect that the eggs were to be "fancy storage packed Aprils" known as "fancy selected storage eggs," a quality considered by him "second to none." Nor was there any dispute between them as to the effect of storage upon eggs of the quality contracted for. The general manager of the defendant testified that selected storage eggs, stored the length of time that the eggs in question were, do not deteriorate in quality in storage except that there is a slight evaporation.

Upon the question of quality it appeared that the first carload, one-fifth of the total amount, was delivered about the 1st of December, 1899, and the other four carloads between that date and the eighth of January following; that immediately upon delivery of each carload the eggs were inspected by plaintiffs' manager, the official egg inspector of the New York Mercantile Exchange, and others, all persons experienced in the business and competent to pass upon the quality of eggs, who substantially agreed that the eggs were storage seconds, a quality inferior to storage firsts, and were not of the grade known as selected April storage eggs. On the part of the defendant the witness Hanford testified that he saw the first car and inspected the eggs; that they were of the usual high quality of Hanford packed and were of the quality sold; it appears, however, that he did not examine the other four cars, nor did the defendant have any one else examine them, although afforded an opportunity to do so. The president of the defendant testified that the eggs were "fancy storage packed Aprils," but in answer to a cross interrogatory, stated in substance that he had noth-

ing personally to do with the selection of the eggs, and defendant's warehouseman, whose testimony was taken by commission, also stated that the eggs were selected storage packed April eggs, but in answer to a cross interrogatory said he did not personally make any selection of the eggs; that such selection was made by a force of from twenty to sixty hands under the direction of the superintendent.

This being the condition of the evidence at the close of the trial, we think the court could not do otherwise than submit the case to the jury to pass upon the question involved, viz., whether the eggs were of the quality contracted to be sold.

The jury rendered a verdict for \$1,800, the difference between what the eggs brought on the sale and what they would have brought had they been of the quality represented, and from the judgment entered thereon the defendant has appealed.

I think the trial court correctly held upon the facts presented that under the terms of the contract there was a warranty on the part of the defendant as to the quality of the eggs. The rule seems to be well settled that upon a sale of personal property where inspection of it is not possible at the time and the seller knows the quality and the buyer does not, the representations made by the seller as to the quality are to be regarded as a warranty. (*White v. Miller*, 71 N. Y. 118; *Carleton v. Lombard, Ayres & Co.*, 149 id. 137; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108.) Here the sale was made in New York. The eggs were in defendant's warehouse at Sioux City, Iowa. The defendant knew the quality and represented them to be "fancy selected eggs in storage." The defendant knew that the plaintiffs were relying upon its representations as to quality because they had no representative at Sioux City, and if they had it is difficult to see how an inspection — the eggs being then in storage — could have been made. The evidence shows that eggs when placed in storage retain their quality except for a slight evaporation, and the evidence is sufficient to sustain the finding that the eggs, when delivered, were not of the quality purchased. But it is said that the plaintiffs ascertained the quality of the eggs when the first carload was received, and, therefore, they are not in a position to recover, inasmuch as they thereafter ordered the other carloads sent forward. I am unable to see any force in this contention. It would hardly be claimed if the first carload had proved satisfactory and been

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accepted that the plaintiffs would thereby have been bound to accept the other four carloads, even though of an inferior quality. Nor do I think the plaintiffs would have been justified in rejecting all of the eggs because the first carload proved to be unsatisfactory. The eggs were composed of five separate lots, for which five distinct warehouse receipts were given, each having a separate number which indicated where stored, and each lot was separately insured. The plaintiffs did not have a right to assume under such circumstances that all of the eggs were inferior in quality because the first carload was. But whether this conclusion be correct or not, if there was a warranty, then the plaintiffs had a right to rely upon it, order all of the eggs delivered and look to the defendant for any damages which they might sustain for a breach of the warranty. (*Pierson v. Crooks*, 115 N. Y. 539.)

Other questions are raised by the appellant as to the admission of evidence. An examination of the record fails to disclose any errors in this respect. Nor was any error committed in the instructions given to the jury. All of defendant's requests to charge, with one exception, were granted, and that was properly refused. It was: "The defendant is entitled to a verdict and the jury must decide accordingly." From what has been said it is clear that instructions to this effect would have been error. It was for the jury to determine from all of the facts under the rule of law laid down by the trial court whether or not there was a breach of warranty. The measure of damages adopted was the correct one. It was the difference between what the eggs brought on the sale and what they would have brought had the quality been as represented. This was less than the difference between the price paid and what was realized, the plaintiffs having to stand the loss by reason of the depreciation of the market price.

It follows that the judgment and order appealed from must be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and HATCH, JJ., concurred.

Judgment and order affirmed, with costs.

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MARY WIMMER, Respondent, v. METROPOLITAN STREET RAILWAY
COMPANY, Appellant.

Negligence — a statement made by the husband of an injured party to an employee of a railroad corporation charged with the negligence causing the injury is inadmissible — a party is concluded by an answer made by a witness as to a collateral matter — when an employee is not engaged in his master's business.

In an action brought to recover damages for personal injuries sustained by the plaintiff, the plaintiff contended that she received her injuries in consequence of being thrown from one of the defendant's street cars while she was attempting to board it, because of the car starting with a violent jerk before she had time to get on the car.

The defendant contended that, after the plaintiff had boarded the car and the car had started, she discovered that her husband and daughter had not succeeded in boarding it and thereupon deliberately stepped off the car.

Upon the trial the defendant called one Worden, a car starter in its employ, as a witness, and he testified in support of the defendant's version of the transaction. It appeared that after the accident Worden assisted the plaintiff's husband in removing the plaintiff to a waiting room. After the defendant had closed its case, the plaintiff recalled Worden to the stand and interrogated him respecting a conversation with the plaintiff's husband in the waiting room. Worden denied having had the conversation, and, among other things, testified that the plaintiff's husband did not tell him in the waiting room that his wife was thrown from the car. Subsequently the plaintiff's husband was called as a witness and, over the defendant's objection, was allowed to testify that he had a conversation with Worden in the waiting room and that in the course thereof he told Worden that his wife had been thrown from the car.

Held, that the admission of the husband's evidence was improper;

That when the plaintiff called Worden and interrogated him in respect to the alleged conversation, a matter collateral to the issue, she became bound by his answers and could not, therefore, call witnesses to contradict him;

That the evidence was prejudicial to the defendant, as it allowed the jury to consider the husband's declaration that his wife had been thrown from the car;

That the declarations made by Worden in the waiting room after the accident were not binding upon the defendant as he was not then engaged in the defendant's business.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 1st day of June, 1903, upon the verdict of a jury for \$7,500, and also from an order entered in said clerk's office on the

23d day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

Charles F. Brown, for the appellant.

Lemuel Skidmore, for the respondent.

HATCH, J :

By this action damages are sought to be recovered for injuries alleged to have been sustained by the plaintiff through the negligent acts of the defendant. Upon the trial evidence was given by the plaintiff tending to show that she was a married woman, about forty-eight years of age, at the time of the reception of the injuries that on the 30th day of September, 1899, the plaintiff, in company with her husband and daughter, attempted to board a street car on Fourth avenue, at the entrance to the tunnel of the railroad, just below Thirty-fourth street. The plaintiff's husband signaled for a car to stop, and in response thereto the car came to a stop close to where plaintiff was standing. The car was somewhat crowded and the conductor said to them, "step in, ladies; there is plenty of room inside." Two women got on the car before plaintiff made an attempt to go aboard. As she placed one foot upon the step, she grasped hold of the rail on the rear dashboard with her left hand and held up her skirts with her right hand, and while she was in the act of raising her other foot from the ground the car started with a violent jerk, which caused her to partially lose her balance, and while trying to recover herself the car gave another jerk, which precipitated her to the pavement and she received injuries of quite a serious character. Upon the part of the defendant evidence was given tending to establish that the plaintiff boarded the car at the place stated; that after she was aboard the car was started; that the plaintiff then discovered that her husband and daughter had not succeeded in getting on the car, whereupon she deliberately walked off after it had proceeded some little distance and was thrown to the pavement and injured. These two theories were supported by the testimony, upon either side, of a number of witnesses and the case upon the testimony presented a question of fact which required the court to submit the same to the jury.

Several errors are urged upon our attention, one of which we

regard as fatal to the judgment which has been obtained. During the course of the trial Eugene Worden, a witness for the defendant and employed by it as a car starter at about the place where the car stopped, was called as a witness and testified in substance to the version of the transaction as claimed by the defendant. It appeared that after the accident Worden assisted the plaintiff's husband in removing the plaintiff to the waiting room nearby, where she remained until she was removed to her home. After the defendant had offered all of its proof the plaintiff recalled Worden to the stand and interrogated him respecting a conversation he had with the plaintiff's husband in the waiting room. In answer thereto Worden testified that he had no conversation with the plaintiff's husband at the scene of the accident; that plaintiff's husband did not tell him in the waiting room that his wife was thrown off the car and that he did not ask him what was the matter; that he did not remember stating to him that he "was sorry that such an accident should happen to one of my neighbors, as I lived in the same vicinity;" that he did not tell him that he had not the number of the car, but that he had the number of the following car; "I did not then say to Mr. Wimmer, 'I know the fellow. He never said a word to me about the accident,' or words to that effect. Speaking of the conductor of the car, I am sure I didn't." And he further stated: "No conversation except in relation to his name and address. I am not positive in reference to whether I told him that I was sorry that it happened to a neighbor. I didn't say, 'I know the fellow. He never said anything to me about the accident.' I know I didn't say such a thing as that. I am positive of that." Subsequently the husband of the plaintiff was called as a witness and interrogated with respect to what transpired in the waiting room. This was objected to by the defendant as incompetent, improper, irrelevant, immaterial, as it was not proof in rebuttal. The objection was overruled, and the witness testified with respect to where he saw Worden and stated that he had a conversation with him at the waiting room. He was then asked: "What was that conversation?" To which the defendant objected upon the same grounds as before, and upon the further ground that it was offered for the purpose of contradicting the witness on the matter brought out by the plaintiff, that such matter was purely collateral; that the plaintiff was bound by

it and should not be permitted to contradict what he said or denied. This objection was overruled, exception was taken, and the witness was permitted to testify: "When the starter came up to me he asked me what was the matter. So I told him my wife was thrown off the car. So he asked me: 'What is your address? What is your name? Where do you live?' I stated to him the name and address. So after that he said, that 'I am very sorry that that must happen to one of my neighbors.' Further on I told him that the number of the car I took was the following car after the car the accident happened on, and the time when it happened. So he looked at me and says: 'Well, I know the fellow. He never said a word to me.' Then my wife, she fainted away, and he rung up for an ambulance." This evidence was improperly received, as it bore upon a matter collateral to the issue. When the plaintiff called Worden and interrogated him in respect thereto she became bound by his answers, and could not thereafter call witnesses to contradict him. That a ruling permitting such an examination constitutes reversible error has been recently held by this court. (*Deutschmann v. Third Ave. R. R. Co.*, 78 App. Div. 413, and cases cited.) The evidence was distinctly prejudicial, as the plaintiff was permitted to have considered by the jury the husband's declaration that his "wife was thrown off the car." This was the vital issue in the case, and the husband was enabled to give in evidence his declaration of the fact long after the accident had happened. The conversation was clearly collateral, and when the witness Worden denied that such statement was made to him at that time, the plaintiff had no legal right to contradict it. The conversation was also improper for another reason. The declarations made by Worden at the station after the accident happened were not binding upon the defendant. He was not then engaged in the defendant's business, and his declarations could not be made available to fasten liability upon the defendant, and they could not be proved, either by way of contradiction or otherwise, any more than the declaration of a stranger could be taken after the happening of the event.

There are other rulings upon evidence, especially those relating to the examination of the physicians, bearing upon the permanent character of the injuries, and also in permitting Dr. Balser to testify as an expert in nervous diseases after he had stated that he was not

qualified to give expert testimony upon the subject, which are doubtful in the extreme. We do not discuss them, however, as they may not arise upon another trial.

For the error above noted the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order reversed and new trial ordered, costs to appellant to abide event.

THE NATIONAL PARK BANK OF NEW YORK, Plaintiff, v. CYRUS J. CLARK, as Receiver of the SUPREME COUNCIL OF THE ORDER OF CHOSEN FRIENDS, and Others, Respondents, Impleaded with LIZZIE G. BROWN, Appellant, and Others, Defendants.

Fraternal beneficiary corporation of the State of Indiana — attachment by a beneficiary of a "relief fund" deposited in bank in the State of New York — right thereto of the attaching beneficiary as against receivers of the corporation appointed in Indiana and in New York — such fund is not impressed with a trust.

The Supreme Council of the Order of Chosen Friends was a fraternal beneficiary corporation organized under the laws of the State of Indiana and was operated upon the assessment plan. The assessments were not levied to pay particular claims, but to pay claims generally. Ten per cent of the proceeds of the assessments were devoted to the general expenses of the corporation and the remaining ninety per cent was deposited in a fund known as the "Relief Fund" and used for the payment of claims. The "Relief Fund" was deposited in various banks throughout the country and checks drawn by the corporation in payment of approved claims were paid by the banks in which the relief fund was deposited without regard to the order in which such checks were issued.

July 16, 1900, the association paid one Brown, who held as beneficiary under a certificate issued by the association an approved claim for \$2,000, \$200 on account thereof. December 14, 1900, a temporary receiver of the corporation was appointed by the Supreme Court of Indiana on the ground that the corporation was, and had long been, insolvent. December 15, Brown, who was a resident of the State of New York, began an action at law in the Supreme Court against the corporation to recover the balance of her claim. She obtained a warrant of attachment on the ground that the defendant was a foreign corpo-

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ration and served such warrant upon a New York bank in which \$7,067.62 of the relief fund had been deposited to the credit of the "Supreme Council of the Order of Chosen Friends Relief Fund." December 22, 1900, a temporary receiver of the assets of the corporation within the State of New York was appointed. December 27, 1900, the bank instituted an action to determine the rights of the various parties in the fund.

Held, that Brown's right to the fund by virtue of her attachment lien was superior to that of the receivers of the corporation;

That the funds deposited with the banks were subject to the claims of the corporation's creditors, and were not impressed with a trust in favor of those entitled to share in the relief fund.

APPEAL by the defendant, Lizzie G. Brown, from a judgment of the Supreme Court in favor of certain of the defendants, entered in the office of the clerk of the county of New York on the 30th day of September, 1902, upon the decision of the court rendered after a trial at the New York Special Term.

James S. Darcy, for the appellant.

Thomas Cooper Byrnes, for the respondent Clark.

William L. Mathot, for the respondents Martin and Reeve.

HATCH, J. :

The plaintiff, a national banking association, brought this action in equity, in the nature of a bill of interpleader, in order that it might pay into court the amount of a deposit of \$7,067.32, carried on its books to the credit of the "Supreme Council of the Order of Chosen Friends Relief Fund." The plaintiff asked that upon payment it be discharged from further liability and that the defendants settle among themselves their conflicting claims to the fund. The relief sought upon the part of the plaintiff was granted, and upon payment of the money into court the plaintiff was dismissed from the action by an interlocutory judgment entered therein. The appellant claimed a lien upon the fund to the extent of \$1,800 by virtue of an attachment levied thereon. The respondents claim the entire fund by virtue of their appointment as receivers of the corporation to which the fund belonged. The issues raised by the conflicting claims of the defendants were thereafter tried, and resulted in a judgment in favor of the receivers. The facts are undisputed, and so far as material are as follows: The Supreme Council of the

Order of Chosen Friends was a fraternal beneficiary corporation, incorporated under the laws of the State of Indiana, and had its principal place of business in Indianapolis in that State. The corporation in all its branches was controlled by a board, known as the "Supreme Council." A grand council was organized in each State where the corporation did business, and this grand council had jurisdiction over the local councils of that State. The corporation had articles of association, a constitution and by-laws, regulating the business and the control of its members. It issued a certificate or policy of insurance to its members, which provided that upon the death of a member in good standing it would pay to the beneficiary named therein the amount called for in the certificate. The funds requisite for the payment of these obligations were obtained by the corporation through assessments levied upon the members collected by the local councils and transmitted to the corporation. Ninety per cent of the money thus realized was devoted by the corporation to the payment of its certificate obligations, and this money was deposited in a fund known as the "Relief Fund," the remaining ten per cent being devoted to the general expenses of the corporation. The assessments were not levied to pay particular claims, but to pay claims generally. The "Relief Fund" money of the corporation was deposited in various banks throughout the country and the plaintiff bank was one of such depositories, and had on deposit at the time this action was commenced the sum of \$7,067.32. Checks in the form of a warrant were issued by the corporation in payment of the approved claims, and such checks were paid by the bank as presented, without regard to the order in which they were issued by the corporation. On the 1st of July, 1900, Mary C. Vandervoort died, a member in good standing, the appellant Brown being her daughter and the beneficiary named in her certificate of insurance for the amount of \$2,000. The appellant's claim was duly approved by the corporation which paid \$200 on account of the claim upon July 16, 1900, and the balance of \$1,800 still remains unpaid. On December 15, 1900, the appellant, being a resident of Kings county, N. Y., began an action at law in the Supreme Court of that county against the corporation to recover the said sum of \$1,800. In that action a warrant of attachment was issued on the ground that the defendant was a foreign corporation and the

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warrant was duly served upon the bank by the sheriff of New York county, and the same has never been vacated. Other attachments on similar claims were levied upon the fund, but none of those attaching creditors have appealed. On December 14, 1900, the defendant Clark was appointed temporary receiver of the corporation by the Supreme Court of Indiana on the ground that the corporation was, and had long been, insolvent, and on December 18, 1900, the respondent Clark made a demand upon the bank for the sum deposited therein, payment thereof was refused and upon December 19, 1900, Clark began an action in the Supreme Court to recover said amount. In May, 1901, Clark was appointed permanent receiver of the corporation by a judgment of the Supreme Court of Indiana by which judgment dissolution of the corporation was also decreed. On December 22, 1900, the respondent Martin was appointed temporary receiver of the assets of the corporation within the State of New York. On December 27, 1900, the bank instituted the action of interpleader and the court ordered that the fund be paid into court subject to all the existing liens. It is the contention of the defendant receiver that the fund should be paid to the New York receiver and after his fees and expenses are deducted that it should then be paid over to the Indiana receiver, and by him disbursed to all the creditors of the corporation *pro rata*; the court below so held, and from the judgment entered thereon this appeal is taken.

Upon the death of Mrs. Vandervoort the appellant Brown became entitled to receive from the corporation the amount represented by the beneficiary certificate. The claim thereunder having been approved by the corporation it became a liquidated claim for that amount and Mrs. Brown thereupon became a creditor of the corporation; the obligation resting upon it was to pay the claim, and failing in that it was guilty of a breach of contract and Mrs. Brown became vested with a cause of action against the corporation upon such breach. (*Matter of Equitable Assn.*, 61 Hun, 299; *Strasser v. Staats*, 59 id. 143; *Anderson v. S. C. of O. of C. F.*, 135 N. Y. 107.) This is the recognized rule of law in the State where the corporation was created. (*Elkhart Mutual Aid, Benevolent & Relief Assn. v. Houghton*, 103 Ind. 286.) Being thus invested with a cause of action, Mrs. Brown had the right to resort to any

remedy authorized by the law of this jurisdiction to enforce her claim. The defendant corporation having property and funds within this State and being a foreign corporation, a remedy by attachment in favor of the creditor came into existence. (Code Civ. Proc. §§ 635, 636.) Under such circumstances an attachment regularly issued creates a right in the creditor to the fund or property upon which the same is levied superior in right to the claim of a receiver of the corporation appointed in the home jurisdiction, even though such receivership is prior in point of time to the levy of the attachment, if it be levied prior to the appointment of a receiver in this State. (*Hammond v. Nat. Life Assn.*, 58 App. Div. 453; *Barth v. Backus*, 140 N. Y. 230; *Mabon v. Ongley Electric Co.*, 156 id. 196.)

It is said, however, that this rule conflicts with the decision announced by the Appellate Division in the second department in *Popper v. Supreme Council* (61 App. Div. 405), which case was cited with approval in *Hallenborg v. Greene* (66 App. Div. 590). The most cursory examination shows that this contention is without foundation. In the *Popper* case the question arose upon a demurrer to a complaint in an action brought by a creditor of the corporation in this State, on behalf of himself and others similarly situated, for the purpose of having a receiver appointed, to the end that the assets of the corporation might be equally distributed among the persons entitled thereto, and the court therein simply passed upon the sufficiency of the complaint as stating facts sufficient to constitute a cause of action and reached the conclusion that it did. It did not, however, undertake to determine, nor did it decide, as to the rights of attaching creditors, which had become fixed prior to the appointment of a receiver in this State or prior to the institution of the action therein, the subject of consideration. On the contrary, the court expressly said: "We are not now concerned with the question of the distribution or disposition of the funds in the manner adopted in that case (referring to *People v. Granite S. P. Assn.*, 41 App. Div. 257), but simply with the question of jurisdiction and whether the complaint states facts sufficient to constitute a cause of action." Undoubtedly the court had jurisdiction to entertain such an action and to appoint a receiver in this jurisdiction, so that the fund might be secured for the benefit of the

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persons equitably entitled thereto, and thereby save the same from waste, through provisional remedies or otherwise. It does not affect the question, however, as to the right of a creditor to levy an attachment upon the funds of the corporation, within this jurisdiction, nor does it militate against the right secured thereby, if it be in all respects regular. The right to impound the fund at the instance of all the creditors presents quite a different question from the right of a creditor to enforce his claim by attachment levied prior to the appointment of a receiver within this State, or the institution of an action which seeks to preserve the fund for the benefit of all. The principle decided in that case was approved in the *Hallenborg* case, but the court took occasion to say in the prevailing opinion, "if the court in Arizona should appoint a receiver, its order would not operate upon the fund belonging to the Cobre Company now in this State." And in the dissenting memorandum made by the learned presiding justice therein it is stated, "I do not think we can reach anything but the fund here," thus clearly disclosing that it was the opinion of the court that the appointment of a receiver in the foreign jurisdiction did not operate to prevent securing liens upon the fund or to divest such lien after the appointment of a receiver in this State. On the contrary, such rights are supported by the decision rendered therein. It follows, therefore, that as no receiver had been appointed in this State at the time of the levying of this attachment, Mrs. Brown acquired a perfect right in the fund to the extent of her claim, unless she be defeated for other reasons.

She has been defeated in enforcing such right by the judgment rendered in this action, based upon the ground that the fund deposited with the plaintiff bank was a trust fund, impressed with the payment of those entitled to share in the relief fund of the corporation. It appeared by the complaint that the relation which existed between the bank and the corporation was the ordinary one of creditor and debtor, created by the deposit of the money with the bank, which was subject to the check or warrant of the corporation. So far as the pleadings are concerned there is no disagreement between the defendant receivers and the bank in this respect. The answer of the Indiana receiver avers that the plaintiff "received on deposit and agreed to repay to the said The Supreme Council of

the Order of Chosen Friends, or to its order on demand." And at the time of the appointment of the receiver "there remained in the hands of said plaintiff of the said moneys so deposited as aforesaid, a balance undrawn." The averment in the answer of the New York receiver is "that the said funds so on deposit with the plaintiff herein or for which it was indebted to said Supreme Council at the times hereinbefore mentioned * * * was the property of the Supreme Council of the Order of Chosen Friends when these defendants were appointed receivers as aforesaid and they as such receivers are entitled to the same in pursuance of the terms of said final judgment." It is apparent, therefore, that, so far as the pleadings are concerned, the relation shown to exist between the bank and the corporation was that of debtor and creditor, and the express averment is that the money was the property of the corporation. The money collected upon the assessments for the payment of death claims, and which was set apart or kept in a relief fund, did not cease by reason of such setting apart to be the property of the corporation. The money raised by a particular assessment was not used or expected to be used for the payment of a particular death claim. On the contrary, the fund thus collected was used for the payment of claims generally and claims which had been approved and for which a warrant was issued were paid therefrom without regard to the priority of the issuance of the warrant. It was a general fund created for that purpose, but it did not belong either to the insured or the beneficiary. The issuance of the warrant for the payment of an approved claim did not create a lien thereon, nor did it transfer title to the fund any more than any other check or order for the payment of money, and until paid the money remained in the inception of the fund down until final payment the property of the corporation, and as such it was unimpressed with any trust in favor of particular individuals or claims. Such has been the effect of repeated adjudications. (*People ex rel. Attorney-General v. Life & R. Assn.*, 150 N. Y. 94, 116; *People v. Grand Lodge of Empire Order*, 156 id. 533, 540; *People v. Security L. Ins. & A. Co.*, 78 id. 114.) It was said by Judge EARL in the last cited case: "The fund produced by the payment of all the premiums does not in any sense belong to the policyholders, but belongs exclusively to the company; and the policyholders are interested in it in the same

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way only that the creditors of any other corporation are interested in its funds." (*Fisher v. Andrews*, 37 Hun, 176; *Buswell v. Order of the Iron Hall*, 161 Mass. 224.) The only trust in connection with this fund was the trust reposed in the corporation itself, acting through its managing officers, to apply with fidelity the moneys collected to the payment of the claims for which it was collected, but such fact did not make it any less the property of the corporation or change its character as a fund with which to pay creditors. It is very likely true that immediately upon the appointment of receivers in this jurisdiction title to the moneys would become vested in them, but such vesting does not change the character of the fund or destroy the right secured by the levying of an attachment. In such case it would become the duty of the receiver upon reducing the fund to possession to make distribution of the same according to the rights of the parties. The usual course in such proceeding is to provide for the preservation of rights and liens acquired before the appointment of a receiver by attaching creditors and others entitled to particular rights in the order authorizing the receiver to possess himself of the fund. (*Woerishoffer v. North River Construction Co.*, 99 N. Y. 398; *Walling v. Miller*, 108 id. 173; *Matter of Schuyler's Steam T. B. Co.*, 136 id. 169.) The appointment of the receiver preserved the fund for those entitled thereto, and it may be that in the equitable distribution of the assets of the corporation which come to the hands of the receivers particular creditors will be entitled to payment from particular funds held by the corporation, and that those entitled to share in the relief fund may be entitled to preference therein superior to the rights of general creditors of the corporation; but such fact does not divest the lien of an attachment which has been regularly levied upon the property of the corporation prior to the appointment of the receiver within the jurisdiction where the attachment is levied.

It necessarily follows from these views that Mrs. Brown acquired a perfect lien to the extent of her claim upon the fund in question. Such claim she is entitled to enforce as against the receivers, and it becomes their duty to recognize and pay such claim. As the facts are not in dispute and show right in Mrs. Brown to be paid from this fund, it follows that the judgment should be reversed and judgment pass in favor of Mrs. Brown for the payment of the

amount of her claim from the fund; costs of the action awarded to the appellant Brown.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Judgment reversed and judgment ordered in favor of appellant, with costs of action and of appeal.

THE MOUNT SINAI HOSPITAL, Respondent, v. DAVID H. HYMAN,
Appellant.

Conveyance of land to a hospital by a municipality — when the Constitution prohibits the Legislature from authorizing it — the fact that the land was thereby made subject to tax does not afford a consideration.

The charter of "The Jews' Hospital in New York," which was incorporated pursuant to chapter 819 of the Laws of 1848, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies," stated that the purpose of its incorporation was the giving of medical and surgical aid to persons of the Jewish persuasion and for all other purposes appertaining to hospitals and dispensaries. The name of the corporation was subsequently changed to The Mount Sinai Hospital, but no other change was made in its charter. After the change in name was effected, its constitution was changed so as to declare the object of the corporation to be "the establishment, support and management of an institution to be known as the Mount Sinai Hospital, for the purpose of affording medical and surgical aid and nursing to sick or disabled persons of any creed or nationality."

In 1871 it built a hospital building and in 1894 a dispensary upon two parcels of land which were originally part of the common lands of the city of New York and which had been leased to it by the city at a nominal rental, the first parcel pursuant to section 5 of chapter 853 of the Laws of 1868, and the second parcel pursuant to chapter 189 of the Laws of 1881, chapter 45 of the Laws of 1892 and chapter 553 of the Laws of 1892.

The lease of the first plot of ground provided that the premises should be used for a hospital and for the charitable and benevolent purposes for which the lessee was incorporated, and that the buildings erected thereon should be used for such purposes, and should at all times be open for public purposes and to patients of all creeds and denominations. The lease was conditioned to be void if such buildings were not erected and maintained, or if the lessee should cease to use it for a hospital, or to keep the same open for patients of all creeds and denominations, or should use it for any other purpose.

The lease of the second plot of ground contained a covenant that the lessee would "erect or cause to be erected, or maintain upon the said premises

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hereby demised, a building for the use of said hospital and for the reception and treatment of patients needing hospital treatment, and that said party of the second part will not make any charge or receive any compensation for the treatment of patients in any of the wards of the building which shall be erected on the hereby demised premises."

Thereafter, by chapter 257 of the Laws of 1898, the city was authorized to convey the leased lands in the first parcel to the hospital corporation in fee simple absolute, so as to permit and to authorize it to sell and convey or lease the same and devote the proceeds of such sale or the income from such leases to the maintenance and support of the hospital. The acts provided, "But nothing herein contained shall be construed to compel the vendee or lessee to see to the proper application of the purchase price or rent, nor shall any misapplication thereof affect the validity of any deeds or leases made by the Mount Sinai Hospital."

By chapter 166 of the Laws of 1900 a like conveyance was authorized under like conditions of the second parcel.

Pursuant to these acts the hospital corporation presented petitions in which it stated that the leased lands afforded it insufficient space and accommodation, and that it had purchased other lands and desired to sell the leased lands and devote the proceeds thereof to the erection of buildings on the property which it had purchased. The petitions contained the following clause: "Your petitioner pledges itself to apply the proceeds of such sale to the purposes and objects of its incorporation as set forth in its certificate of incorporation as modified by the laws affecting the same."

The commissioners of the sinking fund thereafter passed resolutions authorizing grants of the premises held under the leases to be made to the corporation in fee simple absolute, provided, however, "that the proceeds of said sale, or the income from such leases as may be made by it shall be applied to the maintenance and support of said The Mount Sinai Hospital, but no purchaser or lessee of the whole or any part of said property, his or their heirs, executors, administrators and assigns, shall be compelled to see to the proper application of said proceeds or rentals, nor shall any misapplication thereof affect the validity of any deeds or leases made by the Mount Sinai Hospital; and further provided, that such lots and the improvements thereon shall not be exempt from taxation."

Subsequently the city conveyed the leased property to the hospital corporation in fee simple absolute by deeds which recited the respective resolutions of the commissioners of the sinking fund.

Held, that the conveyances imposed upon the hospital corporation no further obligation than that imposed by its charter;

That the grants were, in all essential respects, gifts and endowments, and that as such they were in violation of the Constitution of the State of New York;

That the conveyances operated in legal effect as a gift of public property for a private use, and were in violation of section 10 of article 8 of the Constitution, which provides, "No * * * city * * * shall hereafter give any * * * property * * * to or in aid of any individual, association or

corporation. * * * This section shall not prevent such * * * city * * * from making such provision for the aid or support of its poor as may be authorized by law;"

That the conveyances were not authorized by section 14 of article 8 of the State Constitution, which provides, "Nothing in this Constitution contained shall prevent any * * * city * * * from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children, or correctional institutions, whether under public or private control. Payments by * * * cities * * * to charitable * * * institutions wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the Legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the State Board of Charities. Such rules shall be subject to the control of the Legislature by general laws;"

That the latter section contemplates the payment of money to charitable institutions to be applied subject to the rules and regulations established by the State Board of Charities, and not the making of absolute grants of real estate subject to no restrictions whatever;

That the fact that the land conveyed to the hospital corporation would be subject to taxation in the hands of its vendee did not constitute a consideration for the grants.

APPEAL by the defendant, David H. Hyman, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of September, 1903, upon the report of a referee, directing the specific performance of a contract for the purchase of certain real property.

Abel E. Blackmar, for the appellant.

F. R. Minrath, for the respondent.

HATCH, J. :

The Mount Sinai Hospital, a domestic corporation, brings this action for the purpose of compelling the defendant to specifically perform a contract executed by him for the purchase from the corporation of certain real estate, claimed to be the property of the corporation, and located on the east side of Lexington avenue, between Sixty-sixth and Sixty-seventh streets in the borough of Manhattan, city of New York. The plaintiff was incorporated in 1852 under the name of "The Jews' Hospital in New York," pursuant to the provisions of "An act for the incorporation of benevolent, charitable, scientific and missionary societies," passed April

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12, 1848, and of the acts amendatory thereof. (See Laws of 1843, chap. 319, as amd.) The purpose of its incorporation, as stated in its certificate, was the giving of medical and surgical aid to persons of the Jewish persuasion, and for all other purposes appertaining to hospitals and dispensaries. Pursuant to the provisions of chapter 627 of the Laws of 1866 its name was changed to "The Mount Sinai Hospital." No other change in its certificate was made by the provision of that act or of any other. After the change in name, however, the provisions of its constitution were enlarged, and the declared objects of the corporation were stated to be "the establishment, support and management of an institution to be known as the Mount Sinai Hospital, for the purpose of affording medical and surgical aid and nursing to sick or disabled persons of any creed or nationality." In 1871 it built a hospital building on what is known as plot I, and in 1894 it erected a building for a dispensary on what is known as plot II. In brief the history of the titles which the corporation has acquired to these two plots of ground is as follows: Such lands were originally a part of the common lands of the city of New York. The source of title in both plots of land is the same, but they passed to the corporation by a different chain of conveyances. Plot I was leased by the city to the corporation under an indenture of lease, dated May 31, 1871, for a period of ninety-nine years at a rental of one dollar per year. The authority for this lease is found in section 5 of chapter 853 of the Laws of 1868, which was an act to make provision for the government of the city of New York. By this act the commissioners of the sinking fund were authorized to execute a lease to the corporation upon such terms and conditions as leases had theretofore been made by the municipal authorities to charitable institutions. The provisions of this lease required that the premises should be used for a hospital and for the charitable and benevolent purposes for which the plaintiff was incorporated, and that the buildings erected thereon should be used for such purposes, and should at all times be open for public purposes and to patients of all creeds and denominations. The lease was conditioned to be void if such buildings were not erected and maintained, or if the plaintiff should cease to use it for a hospital, or to keep the same open for patients of all creeds and denomi-

nations, or should use it for any other purpose. By the provisions of chapter 257 of the Laws of 1898 the commissioners of the sinking fund were authorized to grant to the corporation title to the land in fee simple absolute, so as to permit and authorize it to sell and convey or lease the same and devote the proceeds of such sale, or the income leases, to the maintenance and support of the hospital. The act provided: "But nothing herein contained shall be construed to compel the vendee or lessee to see to the proper application of the purchase price or rent, nor shall any misapplication thereof affect the validity of any deeds or leases made by the Mount Sinai Hospital." After the passage of this act the corporation petitioned the commissioners of the sinking fund for a grant pursuant to its provisions, setting forth therein the lease, the insufficient space and accommodations for the hospital, and expressing the intention to build larger buildings and provide much better accommodations, for which purpose they had purchased a plot of ground on the east side of Fifth avenue, embracing the block between One Hundredth and One Hundred and First streets, with a depth therein of 325 feet, and also setting forth that it desired to sell the lands which it then occupied under the lease and devote the proceeds thereof to the erection of buildings on the property which it had purchased. This petition contained the clause: "Your petitioner pledges itself to apply the proceeds of such sale to the purposes and objects of its incorporation as set forth in its certificate of incorporation as modified by the laws affecting the same." On June 9, 1898, the commissioners of the sinking fund acted upon the petition and passed a resolution that a grant of the premises held under the lease be made to the corporation in fee simple absolute, provided, however, "that the proceeds of said sale, or the income from such leases as may be made by it shall be applied to the maintenance and support of said The Mount Sinai Hospital, but no purchaser or lessee of the whole or any part of said property, his or their heirs, executors, administrators and assigns shall be compelled to see to the proper application of said proceeds or rentals, nor shall any misapplication thereof affect the validity of any deeds or leases made by the Mount Sinai Hospital; and further provided, that such lots and the improvements thereon shall not be exempt from taxation." On or about November 28, 1898, a deed of the premises was made and executed by the mayor

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and city clerk, which deed recited the resolution of the commissioners of the sinking fund, and conveyed the property to the corporation in fee simple absolute.

The title to plot II was acquired by the corporation by a substantially similar process. The first lease was made pursuant to chapter 189 of the Laws of 1881, which authorized a leasing for a period of ninety-nine years at a nominal rent. This was a special act. After authorizing the lease, section 1 of the act recites: "Having in view the provision made by such institution for a class of patients needing hospital treatment, and who would otherwise become a public charge upon the mayor, aldermen and commonalty of the said city." Section 2 of the act provided: "Such lease shall contain a covenant on the part of said corporation * * * that no charge whatever shall be made for the treatment of patients in any of the wards of the buildings to be erected upon the said land." A lease was authorized by the commissioners of the sinking fund April 27, 1888, for a period of twenty-one years, at a rental of \$630 per year, with covenants for three renewals at an appraised rental. A lease pursuant thereto was executed on May first following, containing the covenant for renewals, and, also, "that the lessee shall erect a hospital building and treat all patients free therein." This lease covered a part of plot II. Chapter 45 of the Laws of 1892 authorized the leasing of the remainder of this plot. The act provided: "Such lease to be of a period of ninety-nine years, at such nominal rent as they may deem advisable, having in view the provision made by such institution for a class of patients needing hospital treatment, and who would otherwise become a public charge upon the mayor, aldermen and commonalty of the said city." By chapter 553 of the Laws of 1892 the commissioners of the sinking fund were authorized to modify in such manner as they might deem proper the lease executed pursuant to the provisions of chapter 189 of the Laws of 1881. This referred to the lease of May 1, 1888, and pursuant thereto the commissioners of the sinking fund passed a resolution authorizing a surrender of that lease and awarding a new lease for a period of ninety-nine years at a nominal rental of one dollar a year. Pursuant to these acts and resolutions the leases were executed, each of which contained the following covenant: "And the said party hereto of the second part further covenants and agrees that it will erect or cause to be erected,

or maintain upon the said premises hereby demised, a building for the use of said hospital and for the reception and treatment of patients needing hospital treatment, and that said party of the second part will not make any charge or receive any compensation for the treatment of patients in any of the wards of the building which shall be erected on the hereby demised premises." Subsequently and pursuant to the provisions of chapter 166 of the Laws of 1900 a grant of all of the premises held under the leases of plot II were conveyed by the city to the corporation. The terms of this act and the terms of the resolution and the deed pursuant thereto vesting title in the corporation were in all respects the same as were the act, resolutions and deed under which the grant was made of plot I. It is conceded that the plaintiff has been since the change in its name and now is engaged in charitable work and cares for a large number of charity patients who would otherwise become a charge upon the city. In the main it derives its funds from members, patrons' dues, legacies, bequests and charitable gifts, and some revenue is derived from patients who pay. Since 1898 the city has paid a per capita allowance of sixty cents per day for each free hospital or surgical patient. Pursuant to the statement contained in its petition to the commissioners of the sinking fund for a grant, the corporation has purchased the block of land mentioned therein and conducts its hospital and charitable work upon an enlarged scale at that place, and commensurate with the accommodations which it has to offer.

On December 6, 1901, the corporation and the defendant entered into a contract whereby the plaintiff agreed to sell and the defendant to purchase the Lexington avenue property, which was the property the corporation received from the city, for the sum of \$425,000, the purchase price of which, \$20,000, was paid in cash upon the execution of the contract, and \$30,000 additional was paid on the 20th day of January, 1902. The remainder was to be paid in cash and mortgages to be given upon the different subdivisions of the property. The title known as lot No. 1 of plot II was passed March 1, 1902, at which time the defendant accepted a deed therefor, and paid \$10,000 additional in cash and gave a purchase-money mortgage for \$51,500. The title to the remainder of the land sold was to be passed at such time before November 1, 1903, as the corporation should elect. After the acceptance of the deed above mentioned, it was agreed

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between the parties that should the title to the premises prove to be unmarketable, the corporation would accept a reconveyance of the same, cancel the mortgage and repay all the moneys paid by the defendant upon the contract of purchase. Thereafter the parties agreed, on the 13th day of July, 1903, as the time for closing the contract, at which time the plaintiff tendered its deed to the defendant of the remaining portion of the land, demanded the execution of the purchase-money mortgages and the payment of the remainder of the purchase price as called for in the contract. The defendant rejected the title as tendered, claiming that the same was unmarketable for the reason that it depended upon the leases and deeds heretofore mentioned from the city of New York; that the same were invalid, as having been made in violation of law and of the Constitution of the State, and that by reason thereof the corporation was unable to convey a marketable title.

It was suggested by the learned referee, and is argued by the respondent upon this appeal, that some consideration for the grants from the city of New York to the corporation is found in the fact that the land granted would be subject to taxation in the hands of a purchaser from the corporation. It is manifest that such fact cannot be deemed a consideration in any sense. If it could be construed as a valuable consideration, it would support a grant from the city by way of gift to a private individual, for in his hands it would immediately become the subject of taxation. Every conveyance could be supported under such consideration. The learned referee found that the grants were made for a good and valuable consideration, which he proceeds to recite as being services theretofore rendered in the treatment and care without charge of persons whose treatment would otherwise have been a charge and burden upon the city of New York, and for such service thereafter rendered in maintaining the hospital for the purposes described. As the evidence upon this subject is undisputed, such finding, although expressed as a finding of fact, is for all essential purposes a conclusion of law. Whether a valuable consideration sufficient to support these grants can be said to exist, depends upon the legal results which necessarily flow from the entire transaction. The incorporation of the plaintiff was voluntary. It took upon itself the burden of discharging the obligation which it assumed. The fact that in

process of development it enlarged its scope and purposes and thereunder discharged a public obligation which it would have been proper for the city to assume did not create any legal obligation against the city. (*Trustees of Exempt Firemen's Fund v. Roome*, 93 N. Y. 313.) The care of the poor and the aid which was rendered to poor people by the corporation is shown to be of a character which would have authorized the appropriation of public moneys in discharge of the obligation, and it is probably true that the city was authorized by general provisions of law and also by the provisions of the statutes, to which we have called attention, to recognize the discharge of such obligation by the corporation as creating a moral obligation against the city, which it might discharge by the payment of public moneys. (*Wrought Iron Bridge Co. v. Town of Attica*, 119 N. Y. 204; *Matter of Straus*, 44 App. Div. 425.) The continued discharge by the corporation of such obligation would, as a necessary consequence, furnish the basis upon which the city could continue in recognition of the discharge of its public obligation, and thereby right would exist for the appropriation of public funds for its support within constitutional restraints. This brings us to considering whether the grants of property in the present case can be sustained upon the consideration above mentioned, and whether the grant is permitted by the constitutional authority which allows the appropriation of public moneys for such a purpose. Before advertent to the specific constitutional provision applicable to the subject, it is well to have clearly in mind the exact status of the corporation and the relation of the city thereto. Under the lease of plot I the act authorizing it was for the erection of a public hospital, and the lease contained a covenant to erect and maintain such hospital upon the demised premises, and also to keep it open at all times during the term of the lease for patients of all creeds and denominations; and it also contained a provision of forfeiture in the event that compliance was not had with these terms, conditions and covenants. At the time of the execution of this lease the constitutional provision now embraced in section 10 of article 8 of the Constitution was not in existence, in consequence of which the power of the Legislature to authorize the appropriation of public moneys was very much broader than the constraints which the constitutional provision now places upon it. (*Matter of Mahon v. Board of Edu-*

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cation, 171 N. Y. 263.) The leases of plot II had different provisions, which we have already noticed. These leases were made after the adoption of the constitutional provision. (See Const. [1884] art. 8, § 11.) Therefore, it was that the terms of the act and the leases themselves contained much broader covenants, doubtless deemed to be essential in order to meet the constitutional restrictions. There is, therefore, the express recital that the corporation is to undertake the obligation of rendering relief to patients needing hospital treatment, who would otherwise become a public charge, and that such treatment should be free. Forfeiture of these leases was attendant upon the failure to discharge by the corporation the covenants contained therein. Under the terms of the grants, however, all covenants of forfeiture, as well as all others, were omitted, and in their place was substituted the clause contained in the resolution passed by the commissioners of the sinking fund. This covenant simply required the application of the proceeds of the land conveyed to the support and maintenance of the corporation. There could be no covenant of forfeiture and at the same time invested in the corporation an absolute title which it could convey to a purchaser subject to no conditions. This condition the acts, resolutions and grants expressly recite. The effect of the grant, so far as the corporation is concerned, was only to impose upon it the obligation of applying the proceeds of the land to the discharge of its chartered obligations. This was all it pledged itself to do in its petition asking for the grant. The language of this pledge is to apply the proceeds of any sale which it makes to the purposes and objects of its incorporation, "as set forth in its certificate of incorporation as modified by the laws affecting the same." The effect of the covenant and of the pledge is, therefore, the same. By reference to its certificate of incorporation, which contains its chartered powers, it is seen to be as recited, "that the particular business, purpose and object of such association and society will be medical and surgical aid to persons of the Jewish persuasion, and for all other purposes appertaining to hospitals and dispensaries." And so far as its charter is concerned this language has never been broadened; nor has it been changed or modified by any legislative act. It is true that in the constitution adopted by the corporation the limitation upon creed is stricken out and in its place is substituted all creeds and nationalities, and the

objects of the incorporation are very much enlarged. The constitution, however, is not a part of the corporation's charter. It may be modified, changed and amended in accordance with the rules and regulations providing therefor without in the slightest degree contravening the corporation's charter; it can strike therefrom the whole of the enlarged purpose by restricting corporate acts to its limited charter provisions without in any legal sense affecting the pledge made in its petition asking for the grant or violating any covenant which is contained in the grants. And if it made entire departure from its present scheme and declined to discharge a public obligation in rendering aid to the poor, it would in nowise affect the terms of the grant or violate any of its covenants or affect the title to the lands in the hands of a *bona fide* purchaser. The effect of this would be an appropriation of public property, ostensibly for a public purpose, which might nevertheless be devoted to exclusively private purposes. Confessedly, an appropriation of public property cannot lawfully be made to such use and we are of opinion that it is equally fatal to the grants that such may be the result. The question is not what was the purpose or what is the present condition or how faithfully the corporation has discharged and is discharging its public obligation. The vice lies in what may be done, and as to that it is clear that the proceeds of these grants may be devoted to an exclusively private purpose and the city left remediless in prevention of it. The grants, therefore, operate in legal effect as a gift of public property for a private use. Section 10 of article 8 of the Constitution of the State of New York, so far as material, provides: "No * * * city * * * shall hereafter give any * * * property * * * to or in aid of any individual, association or corporation. * * * This section shall not prevent such * * * city * * * from making such provision for the aid or support of its poor as may be authorized by law." If we are correct in our construction of the effect of this grant it is clearly void under this provision of the Constitution.

Aside from this question, however, is another which readily forces itself upon the attention when the transaction is considered. The constitutional provision above cited authorizes the appropriation of public funds for the aid and support of the poor. Prior to the Constitution of 1894 the subject of charities had not found a place

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in the several Constitutions of the State. The present Constitution, while making lawful the appropriation of public funds for the aid and support of the poor, did not assume by that provision to regulate or control the subject. Sections 11, 12 and 13 of article 8 made provision, among other things, for a State Board of Charities to be appointed by the Governor, by and with the advice and consent of the Senate, and provided that consistent existing laws relating to charitable institutions should remain in force and be applicable thereto until amended or repealed by the Legislature. Section 14 of such article provides: "Nothing in this Constitution contained shall prevent the Legislature from making such provisions for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any * * * city * * * from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by * * * cities * * * to charitable * * * institutions, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the Legislature. No such payments shall be made for any inmate of such institutions, who is not received and retained therein pursuant to rules established by the State Board of Charities. Such rules shall be subject to the control of the Legislature by general laws." A similar provision has been construed to authorize the payment of money to various institutions. (*White v. Inebriates' Home*, 141 N. Y. 123.) It is upon this case and various others, to which may be added *Sargent v. Board of Education* (177 N. Y. 317), that the respondent relies to uphold these grants. In each of them, however, it is noticeable that the questions involved the appropriation of money and the payment of current funds for the public purpose. It is the evident policy of the State to deal in connection with such institutions, having regard to the continued discharge of the public functions and providing funds to aid in the discharge of current obligations created thereby. The appropriation and payment of money from time to time as necessity requires enables the city at all times to control the proper application of the proceeds and to increase, diminish or withhold the amount appropriated in accordance with the needs of the

institution, and the fulfillment upon its part of the public obligation which it has assumed. The purpose is to make compensation for the discharge of such obligation, and when it ceases its operations or becomes inefficient in the discharge of the public function, courts will not compel payment out of the public funds, even though there be in existence a statute requiring the public authorities to make payment. (*People ex rel. Inebriates' Home v. Comptroller*, 152 N. Y. 399.) The language of section 14 of article 8 of the Constitution clearly contemplates payment of money for these purposes, to be applied subject to the rules and regulations established by the State Board of Charities. This is now the authority for the application of property and money in aid of private institutions that have voluntarily assumed the public obligation, and the provision is that no "payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the State Board of Charities;" thus clearly contemplating that the basis of the appropriation shall have relation to the number of inmates provided for in the particular institutions, the rate of payment being placed upon a per capita basis. Such is the scheme of these enactments, and such have been the cases where the obligation of payment has been assumed and enforced.

The grant in the present case does not appropriate money upon such basis, nor does it devote the land to the use of the corporation for its corporate purposes. In effect it gives the land to be sold for the purpose of creating a fund, which in all essential characteristics operates as an endowment of the institution to the extent of the fund to be derived from the sale of the land. Neither the city nor the State Board of Charities has control of such fund or its expenditures; it is handed over to the institution bodily, to be expended in its discretion for the purposes mentioned. The supervisory control given to the State Board of Charities does not reach such fund, nor control the same in disposition. The control of the State Board of Charities has relation to the inmates and the limitation is that payment may not be made if such inmate be not received and retained pursuant to rules established by the board. So that this fund produced by these grants passes irrevocably to the corporation, to be used in its discretion and subject to no other covenant or pledge upon its part than an agreement to use it for its chartered

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purposes, which may be under such charter private and denominational. The result of such condition is that so far as appropriations are based upon per capita relief afforded by the institution, the most stringent safeguards surround the expenditure of moneys so appropriated, and none can be made unless compliance be had with such provisions of law. If, however, the present grants be sustained, it must follow that lands may be conveyed, or moneys without limit appropriated as endowments for these institutions, without any control or supervision in disposition by any public authority or board.

The corporation itself furnishes the best illustration. The city appropriates, and has since 1898, sixty cents per day for each free hospital or surgical patient. Section 14 of article 8 of the Constitution provides that such moneys shall not be paid to this institution, unless it makes compliance with the rules of the State Board of Charities. Under these grants it obtains property which it has sold for \$425,000, and if the grant be sustained it may receive and appropriate this fund in the discretion of the governing body of the corporation. Clearly such a result was never contemplated by the framers of the Constitution. Nor has any case, so far as we are able to find, supported such a grant. On the contrary, the expression of the courts upon that subject is to the effect that all appropriations must be subject to control by the State Board of Charities, and such is the constitutional provision. To sustain these grants, therefore, would be to again open the door to the evils which arose prior to the constitutional prohibitions upon the Legislature, which were passed to remedy such evil. We have no doubt but that the present corporation is worthy of the aid which the Legislature has authorized and which the city has attempted to give, and that it is discharging and will continue in the discharge of the public obligation which it has voluntarily assumed; but such facts cannot be considered in sustaining a gift or in authorizing an endowment which is opposed to the public policy of the State, as expressed in organic law. We reach the conclusion, therefore, that these grants are in all essential respects gifts and endowments, and that as such they are in violation of the constitutional provisions of the State. This conclusion, therefore, renders this title unmarketable. As the parties have stipulated that the one succeeding shall have an affirmative judgment it necessarily follows that the judgment should be reversed, and judgment should be

ordered in favor of the defendant upon his counterclaim, costs to the defendant of this appeal and of the action.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Judgment reversed and judgment ordered in favor of defendant upon his counterclaim, with costs of appeal and action.

EDWARD L. GILBERT and JAMES F. LEWIS, Appellants, v. IRVING BUNNELL and GEORGE B. BUCHANAN, Respondents.

Equity—specific performance, when granted—what must appear by the complaint—what does not show that the monetary value of a contract cannot be determined—when a complaint asking equitable relief should be sent to the law side of the court—quære in case of a demurrer thereto.

Courts of equity have jurisdiction to entertain an action for and decree specific performance of a contract for the sale of a chattel or of a chose in action agreed to be transferred. Parties, however, may not demand as matter of absolute right specific performance of such a contract. Whether it will be granted in a given case rests in the sound discretion of the court. Such discretion will be favorably exercised when it is made to appear that compensation in damages is difficult, or impossible of establishment, and that the legal remedy available is consequently inadequate.

Mere statements in the complaint that damages for the breach cannot be established; that difficulty attends upon making proof of damages sustained and that the plaintiff will be unable to prove the sum, or does not know what such damages are, and can only have full and adequate relief by a decree of specific performance, do not make out a case entitling the party to equitable relief. The transaction, as averred, and the facts as they appear in connection with it, must be of such a character as to make it apparent to the court that the exercise of equitable jurisdiction is necessarily essential in order to afford to the party the relief to which he is entitled, and that without it he will be shorn of the benefits of his contract or a substantial part thereof.

The complaint in an action alleged that the defendants agreed to sell to the plaintiffs certain participating subscription rights in an underwriting syndicate of the par value of \$10,000, such sale to be evidenced by a written assignment from the defendants to the plaintiffs; that the plaintiffs had been, at all times, willing to fulfill the contract, but that the defendants had refused to execute the contract transferring such rights. The complaint then alleged the character of the underwriting syndicate, its method of transacting business, the value of the subscription rights and the substantial value of the rights which the defendants had agreed to transfer.

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It further charged that under such rights the defendants had received the sum of \$1,250 returned to them as a part of their subscription to which the plaintiffs were entitled, and also the further sum of \$1,000, declared as dividends and paid by the syndicate to the defendants in amounts of \$500 each. The complaint further averred that said subscription rights were limited in number and could not be purchased in the open market; that the underwriting syndicate was still in existence and that very large profits to it would be realized; that the value of such subscription was very great, but that the amount thereof was conjectural and unknown to the plaintiffs; that there was no basis upon which damages for the breach could be predicated; that what the profits were or would be was unknown to the plaintiffs, and that by reason thereof the plaintiffs had no adequate remedy at law in a recovery of damages for the breach; that the only remedy which would give to the plaintiffs the rights to which they were entitled was by a specific performance of the contract; that upon the execution of the contract with the defendants the plaintiffs agreed to sell and transfer such right to another party and that by reason of defendants' failure to fulfill their contract plaintiffs were unable to fulfill their subsequent contract, in consequence of which they would be subjected to heavy damages.

The relief demanded was that the defendants be required to execute a written assignment of the subscription rights; that they be enjoined and restrained from selling or otherwise disposing of such subscription rights; that the plaintiffs have a money judgment for the several sums of money which the defendants had received on account of such rights and for such other and further relief as might be proper.

An answer was served and, upon the case being brought on for trial at an Equity Term of the court, the trial judge dismissed the complaint on the ground that, under the complaint, the plaintiffs were not entitled to equitable relief.

Held, that the complaint did not entitle the plaintiffs to equitable relief, as there was no more difficulty in establishing the money value of the contract sued upon in this action than in any ordinary case where the value of the contract depended upon the profits to be made therefrom;

That the complaint stated a cause of action at law for a breach of contract;

That it was, therefore, improper, an answer having been interposed and the case having been brought to trial, for the court to dismiss the complaint, but that it should have been sent to the law side of the court.

Quare, if, upon the hearing of a demurrer to a complaint framed to secure equitable relief, it appears that the complaint states a cause of action at law but not a cause of action in equity, whether the court should dismiss the complaint.

Per HATCH and McLAUGHLIN, JJ.; LAUGHLIN, J., concurred in result; VAN BRUNT, P. J., and INGRAHAM, J., dissented.

APPEAL by the plaintiffs, Edward L. Gilbert and another, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 2d day of July, 1903, upon the decision of the court, rendered after a

trial at the New York Special Term, dismissing the plaintiffs' complaint.

Robert E. L. Lewis, for the appellants.

F. K. Pendleton, for the respondents.

HATCH, J.:

The complaint in this action was evidently intended to be framed for equitable relief. Such are its general features, and yet it is clear that facts are averred under which the plaintiffs show themselves entitled to strictly legal relief and the prayer of the complaint in part is for a money judgment. So far as is essential to a disposition of the question presented by this appeal, the complaint avers that the plaintiffs are copartners, engaged in the business of buying and selling on commission and dealing in securities in the city of New York; that the defendants are copartners engaged in the same business in said city; that about the 26th day of February, 1901, the defendants, in writing, agreed to sell and plaintiffs agreed to purchase certain participating subscription rights in the United States Steel Corporation Underwriting Syndicate of the par value of \$10,000, agreeing to pay therefor a specified sum, such right to be evidenced by a written assignment from the defendants to the plaintiffs; that the latter have been at all times ready and willing to fulfill the contract on their part, but the defendants have refused to execute the contract transferring such right. The complaint then avers the character of the United States Steel Corporation Underwriting Syndicate; the method by which it transacted its business; the value of the subscription rights and the substantial value of the right which the defendants had agreed to transfer, and further charged that under such right defendants had received the sum of \$1,250 returned to them as a part of their subscription to which the plaintiffs are entitled, and also the further sum of \$1,000, declared as dividends and paid by the syndicate to the defendants in amounts of \$500 each. The complaint further avers that said subscription rights are limited in number and cannot be purchased in the open market; that the underwriting syndicate is still in existence and that very large profits to it will be realized; that the value of such subscription is very great; the amount of

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which is conjectural and unknown to the plaintiffs; that there is no basis upon which damages for the breach can be predicated; that what the profits are or will be are unknown to the plaintiffs, and that by reason thereof the plaintiffs have no adequate remedy at law in a recovery of damages for the breach; that the only remedy which will give to the plaintiffs the rights to which they are entitled is by a specific performance of the contract; that upon the execution of the contract with the defendants the plaintiffs agreed to sell and transfer such right to another party and that by reason of defendants' failure to fulfill their contract plaintiffs are unable to fulfill their subsequent contract, in consequence of which they will be subjected to heavy damages. Prayer for relief demands a decree that the defendants be required to execute a written assignment of the subscription rights; that they be enjoined and restrained from selling or otherwise disposing of such subscription rights; that the plaintiffs have money judgment for the several sums of money which the defendants have received on account of such right and for such other and further relief as may be proper.

The defendants served an answer to the complaint, and the cause thus became at issue, was placed upon the equity calendar of the court, and coming on to be heard the court granted a judgment of dismissal, based upon the ground that the plaintiffs had not shown themselves by their complaint to be entitled to equitable relief. When the action was commenced the New York Security and Trust Company was made a party defendant, for the reason that it was constituted a depository of the funds received from the underwriting subscription rights. By stipulation the action was discontinued as to this defendant.

It is well settled that courts of equity have jurisdiction to entertain an action for and decree specific performance of a contract for the sale of a chattel or of a chose in action, agreed to be transferred. Parties, however, may not demand as matter of absolute right specific performance of such a contract. Whether it will be granted in a given case rests in the sound discretion of the court. Such discretion will be favorably exercised when it is made to appear that compensation in damages is difficult, or impossible of establishment, and the law will then be inadequate in remedy. (*Williams v. Montgomery*, 148 N. Y. 519; *Bateman v. Straus*,

86 App. Div. 540.) Mere statements in the complaint that damages for the breach cannot be established; that difficulty attends upon making proof of damages sustained and that the plaintiff will be unable to prove the sum, or does not know what such damages are, and can only have full and adequate relief by a decree of specific performance does not make out a case entitling the party to equitable relief. The transaction, as averred, and the facts as they appear in connection with it, must be of such a character as to make it apparent to the court that the exercise of equitable jurisdiction is necessarily essential in order to afford to the party the relief to which he is entitled, and without it that he will be shorn of the benefits of his contract or a substantial part thereof. Mere characterization of difficulty, however strong, does not present such a case. Taking the averments of this complaint as a whole, it fairly appears that the plaintiffs have an adequate remedy at law. It is not impossible, indeed it cannot be said to be difficult, to establish the value of this contract to the plaintiffs. The amount of the subscription is fixed, the profits which have been derived therefrom are known, and what future profits will be derived are susceptible of proof which will approximate, at least, to the actual value of the right which the plaintiffs secured by their contract. There is no more difficulty in establishing the money value of this contract by proof than there is in the horde of cases, where the value of the contract depends upon the profits to be made from a given venture. Values of this character are dealt with to an enormous extent in this commercial center. They are the subject of bargain and sale. The transaction of purchase in the present case shows that the value was known to the extent of enabling parties to agree upon terms with respect to such value. Under such circumstances it is easy to be seen that no more difficulty attends upon proving the value of this contract than in an ordinary case, where profits are involved. The subject-matter of it has been the basis of commercial transactions in this city for a number of years, in which the transactions have run from modest proportions to a magnitude which excites the wonder of the commercial world. Such being the case, it is clear that the plaintiffs by the averments of their complaint have not shown themselves entitled to equitable relief.

Reaching this conclusion, however, does not dispose of the pres-

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ent question, as the law is settled beyond peradventure that if the facts stated in the complaint show that plaintiffs are entitled to any relief, either legal or equitable, their complaint is not to be dismissed because they have not demanded the precise relief to which their averments show them entitled. (*Wetmore v. Porter*, 92 N. Y. 76.) The complaint in this case states a contract; a breach of it; that thereby plaintiffs have sustained damage and the prayer for relief to a limited extent is for money damages suffered on account of the breach, and for such other relief as may be just. We have no difficulty, therefore, in spelling out from this complaint facts which, taken as true, clearly establish the plaintiffs' right to recover money damages in an action at law, and this being true we are not able to see upon what ground the plaintiffs can be thrown out of court altogether. There has been some confusion in the cases regarding the question as to whether when equitable relief is denied, the action should be retained as one at law and the rights of the parties adjusted in that tribunal. It has been held by this court that where a demurrer was interposed to a complaint framed in equity such demurrer would be sustained, even though the complaint might upon some theory be upheld as stating a cause of action at law. (*Black v. Vanderbilt*, 70 App. Div. 16.) This rule was questioned in the second department in *Squiers v. Thompson* (73 App. Div. 552) and this case was affirmed on appeal without opinion (172 N. Y. 652). Therein, however, the complaint was held to be one proper for equitable cognizance; consequently it was not essential to a determination therein to consider whether the rule announced in *Black v. Vanderbilt* was correct or not, as it was not necessarily involved therein. The discussion in *Squiers v. Thompson* also tends further to breed confusion by an intimation therein that the case of *Cody v. First Nat. Bank* (63 App. Div. 199) — decided by this court — was in conflict with *Parker v. Pullman & Co.* (36 id. 208). A cursory examination of these cases show that there was no conflict between them, although the learned presiding justice who wrote in *Squiers v. Thompson* may have thought there was. In *Parker v. Pullman & Co.* (*supra*) it was held that the complaint there under consideration stated an equitable cause of action and it was upheld as such. In *Codu v. First Nat.*

Bank (supra) the cause of action was purely legal and there was no demand for equitable relief in any form. On the contrary, the demand was for specific relief in money damages and the pleading was framed wholly with respect to such relief. The action was in conversion, and it was held that, as by the averments of the complaint it appeared that the plaintiff was not the owner of the property or entitled to its possession at the time of the alleged conversion, the action could not be maintained, and the decision was placed expressly upon that ground. There was, therefore, scarcely a resemblance between these two cases. But whatever may be the rule where a demurrer is interposed to such a complaint it has not been seriously contended, so far as we are aware, that where the parties have joined issue by the service of an answer and gone to trial, that the complaint will be dismissed because the party does not show himself entitled to equitable relief, when the averments of his complaint show him entitled to legal relief. In *Black v. Vanderbilt (supra)* such rule was recognized in the prevailing opinion, for, in speaking upon such subject, Mr. Justice O'BRIEN said: "This latter proposition for which the appellant contends has been applied in cases where an answer has been interposed and thereafter the sufficiency of the complaint was questioned." Such rule was expressly announced in *Ashley v. Lehmann* (54 App. Div. 45); is supported in *Wheelock v. Lee* (74 N. Y. 495), and in *Imperial Shale Brick Co. v. Jewett* (169 id. 143). This court in *Chinchin v. Katzman* (89 App. Div. 595) has announced in specific terms the same rule of law. It follows from these views that the court fell into error in dismissing the complaint.

The judgment should, therefore, be reversed and the action placed upon the calendar for the trial of issues by a jury for disposition, costs of this appeal to the appellant to abide the event.

MCLAUGHLIN, J., concurred; LAUGHLIN, J., concurred in result; VAN BRUNT, P. J., and INGRAHAM, J., dissented.

Judgment reversed and action placed on calendar for trial of issues by a jury for disposition, costs of appeal to appellant to abide event.

JACOB KLIMPL, Respondent, v. METROPOLITAN STREET RAILWAY
COMPANY, Appellant.

Negligence—care required of a motorman on an electric car to prevent a collision with a truck—it is that which a person of reasonable prudence exercising reasonable care would use under similar circumstances.

In an action brought to recover damages for personal injuries sustained by the plaintiff in consequence of a collision at a street intersection between one of the defendant's street cars and a truck which the plaintiff was driving, the court charged, with respect to the duty of the defendant's motorman, "and if you find that he did use all the care that was required of him and *all the care that he could use at the time*, then your verdict will be for the defendant."

Held, that the charge was erroneous, as its effect was to instruct the jury that the defendant was obliged to use an extraordinary degree of care, whereas it was obliged to exercise only that degree of care which a person of reasonable prudence exercising reasonable care would use under similar circumstances;

That the following proposition, "if the motorman of the defendant's car, while operating his car with ordinary care, stopped his car as soon as he discovered that the plaintiff was about to drive in front of his car, defendant is entitled to a verdict," if charged without qualification, would have cured the error, but that as the trial judge in response to the request to charge this proposition said, "I charge that in connection with the charge already made," thus in effect leaving the obnoxious instruction in the case, it did not operate to cure the error.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 22d day of June, 1903, upon the verdict of a jury for \$1,500, and also from an order entered in said clerk's office on the 12th day of June, 1903, denying the defendant's motion for a new trial made upon the minutes.

Bayard H. Ames, for the appellant.

J. M. Birnbaum, for the respondent.

HATCH, J.:

The plaintiff by this action seeks to recover damages claimed to have been sustained by him on account of injuries received through the negligence of the defendant. It appeared from the testimony

that the plaintiff was driving a beer wagon northward along the east side of Third avenue. As he approached One Hundredth street he saw a car coming southward about One Hundred and First street; that he had occasion then to drive across the track to the west side of the street; that he looked again as he started to cross and saw that the approaching car was about in the middle of the block. Plaintiff thought that he had plenty of time to cross, made the attempt but the car struck the wagon just back of the front wheel. He was thrown to the pavement and sustained quite severe injuries. The defendant on the other hand claimed, and gave evidence tending to support the claim, that as the car was approaching the plaintiff, he without any notice of intention so to do, turned and drove onto the track immediately in front of the south-bound car, and when the car was in such close proximity to him that it was impossible to avert the collision. These several claims were supported by witnesses upon either side and we have little hesitancy in reaching the conclusion that the evidence was of such a character as justified the submission of the questions involved to the jury.

We are, however, required to reverse the judgment for a fatal error committed in the charge. Upon the subject of care to be exercised by the motorman in the management and operation of car, the court charged "it was the duty of the defendant's agents or servants in charge of this car to use reasonable care in going along this street, and it was the duty of the motorman to stop the car and avoid this collision provided he had time and opportunity so to do. It was his duty to use care at all times in passing along this street, and if you find that he did use all the care that was required of him and *all the care that he could use at the time* then your verdict will be for the defendant." The defendant excepted to the charge that it was the duty of the motorman to use all the care that he could use. In ruling upon the exception the court stated, "That does not state the language that I used, but it calls my attention to what you mean." It is evident, therefore, that the court fully understood the particular point to which the defendant directed its attention. The obligation resting upon the defendant was to exercise that degree of care which a person of ordinary prudence exercising reasonable care would use under similar circumstances. The defendant was not called upon to exer-

cise all the care that he could exercise at the particular time. Such rule would impose the duty of extraordinary precaution and substitute a more rigid rule of responsibility than the law requires of the defendant in the operation of its cars. In *Lewis v. L. I. R. R. Co.* (162 N. Y. 52) the charge was that if the engineer of the train, which came in contact with a vehicle at a road crossing, "omitted to do any act which might have prevented the collision," the defendant was guilty of negligence. This was held error, for the reason that it imposed a more enlarged obligation upon the defendant than the law required. In *Leonard v. Collins* (70 N. Y. 90) the charge was that if the defendant could do "anything that could have prevented the accident" he was guilty of negligence and such charge was held to be error. In *Reardon v. Third Ave. R. Co.* (24 App. Div. 163) in charging upon the subject of the care required in the management of vehicles by each party, the court said: "They were bound to use the same degree of care, the same degree of prudence. Each was bound to look out for and, if possible, prevent any accident." This charge was held to be error calling for the reversal of the judgment which had been obtained in plaintiff's favor, although the charge as made bore as heavily upon the plaintiff as upon the defendant. Such consideration, however, did not mitigate the wrong which had been done to the defendant, as it enlarged his responsibility for his acts beyond what the law required. These authorities are directly in point upon the question involved and are decisive in showing that error was committed in the charge. This error was not cured by the subsequent charge of the court that "if the motorman of the defendant's car, while operating his car with ordinary care, stopped his car as soon as he discovered that the plaintiff was about to drive in front of his car, defendant is entitled to a verdict." Such charge would have cured the previous error if it had been made without qualification. The court, however, said in answer to this request, "I charge that in connection with the charge already made." The effect of this was to leave the charge as originally made to stand and subjected the defendant to the ruling that it was required to exercise all the care that could be used at the time. Such was the rule of liability upon which the case went to the jury, and as it imposed a higher degree of care upon the defendant than the law imposed it was erroneous.

For this reason the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

CHARLES A. SECOR, as Administrator, etc., of CHARLES A. SECOR, Deceased, Respondent, v. TRADESMEN'S NATIONAL BANK OF THE CITY OF NEW YORK and Others, Appellants, Impleaded with Others.

Action by an administrator — demurrer that he has not legal capacity to sue — right of a surviving partner in firm assets — his relation to the personal representative of his deceased partner — right of the latter — his remedy by action is for an accounting, not to enforce particular claims.

A complaint in an action brought by an administrator is not demurrable on the ground that the plaintiff has not legal capacity to sue, where it does not appear upon the face of the complaint that there is any defect in his appointment as administrator. There is a decided difference between a capacity to sue and the right to maintain an action.

Upon the death of one of the two members of a firm, the legal title to all the personal property of the firm vests in the surviving partner, and the latter has the sole and exclusive right to enforce the collection of the choses in action belonging to the firm, to pay the firm debts and to liquidate the firm affairs.

The relation existing between the surviving partner and the personal representative of the deceased partner is not that of trustee and *cestui que trust*, although it partakes somewhat of that nature.

The personal representative of the deceased partner is entitled to have the assets of the partnership applied to the payment of the firm debts and to the distribution of any surplus that may remain.

For the purpose of enforcing this right, the personal representative is entitled to maintain an action against the surviving partner for an accounting as to all his transactions, but he cannot maintain actions to enforce partnership claims or to reduce the partnership assets to possession.

Semble, that in case of fraud, wasteful mismanagement and disregard of the rights of deceased partners, the personal representative may maintain an action for an accounting and the appointment of a receiver by whom the partnership claims may be enforced.

Where, therefore, the personal representative of the deceased partner alleges that the surviving partner has refused to bring an action to recover a fund

belonging to the partnership, and has attempted, without consideration, to release his claim thereto, but does not allege that the assets of the copartnership are sufficient to pay the firm debts, he cannot maintain an action against the surviving partner and persons who have received portions of the fund in question to compel an accounting with respect to such fund and the payment of the same to him for the following reasons, viz., that the right to maintain such an action is vested solely in the surviving partner, and that, in the absence of proof that the firm assets exceed the firm liabilities, the personal representative of a deceased partner has no beneficial interest in the fund.

APPEAL by the defendants, the Tradesmen's National Bank of the City of New York and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 7th day of December, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the said defendants' demurrers to the plaintiff's complaint.

Charles M. Demond, for the appellants.

Frank P. Ufford, for the respondent.

HATCH, J. :

The complaint avers that Phineas Burgess, Charles A. Secor and James F. Secor were, prior to December, 1884, copartners, doing business under the firm name of Burgess & Secor; that Burgess died in 1884, leaving a last will and testament, which was admitted to probate, and David Myerle was appointed his executor and qualified as such; that Charles A. Secor died on December 23, 1884, and letters of administration were duly issued to William H. Secor on January 26, 1885. After his death, and after letters of administration were issued, a last will and testament of the deceased was discovered. This will was duly admitted to probate, and the plaintiff was appointed administrator with the will annexed on May 15, 1903. The defendant James F. Secor is the sole surviving partner of said firm. The complaint then avers that a contract was executed by the firm with the United States government for the construction of a war vessel, and out of the performance of this contract a claim arose against the government; that on July 12, 1890, an agreement respecting such claim was entered into between Myerle, as executor, Secor, as survivor, and the defendant Tradesmen's National Bank,

a copy of which is attached to the complaint; that pursuant to such agreement the claim against the government was prosecuted in the Court of Claims of the United States, and resulted in a judgment against the latter in favor of Myerle, as executor, for the sum of \$129,811.45; that this judgment was paid by the government by delivery of its check or draft for that amount, drawn to the order of Myerle, and was by him indorsed to the defendant Logan, representing the firm of Logan, Demond & Harby, attorneys. Subsequently an action was begun by the Continental National Bank, which asserted a claim thereto. In this action a receiver was appointed and the draft, or its proceeds, was turned over to such receiver and was deposited in court to await the result of such action. About April 28, 1899, final decree was entered in that action by the consent of the defendants Logan, Demond & Harby, but without the knowledge or consent of James F. Secor, the survivor, or the present plaintiff. By the terms of such judgment the Continental National Bank was decreed to be entitled to \$11,000 and the remainder of the fund was paid over to Logan, Demond & Harby; that since the entry of this decree these defendants have paid to the defendant bank and certain other persons, including the defendant Myerle, portions of the fund; that upon the payment of the fund by the government James F. Secor, as surviving partner of said firm of Burgess & Secor, became entitled to receive the same after deducting therefrom the expenses of the prosecution and such other sums as were mentioned in the agreement; that thereafter James F. Secor, as surviving partner, demanded of the defendant bank and of Logan, Demond & Harby payment of the money so received, but said defendants refused to comply therewith; that thereafter on October 20, 1900, Secor, as surviving partner, commenced an action against the defendant bank, Myerle, as executor, and Logan, Demond & Harby for an accounting of such sum; that thereafter, and on March 1, 1901, Secor, as surviving partner, undertook to release any individual claim that he might have against the bank, but that such release was without consideration and was made without authority; that thereupon this action was discontinued; that plaintiff has duly requested James F. Secor to bring this action for an accounting of this fund, and he has refused to bring the same; that the defendant bank is insolvent. Upon these averments the plaintiff demanded

judgment that the defendant bank and the defendants Logan and others be required to account for the money so received and for the necessary disbursements and charges connected with the same, and that the defendants be required to pay over to the plaintiff the balance found to be due on such accounting; that a receiver be appointed pending the action; that the defendant Myerle, as executor, be required to account for the money which he has received, and that such order or decree be made as to the interests of the plaintiff James F. Secor as may be proper and for such other and further relief as may seem equitable.

The agreement mentioned in the complaint provides for a prosecution of the claim against the United States and for the distribution of the fund if secured. The defendants separately demurred to the complaint, each upon the same grounds: *First*, that the plaintiff has not legal capacity to sue; *second*, that it appears upon the face of the complaint that there is a defect of parties plaintiff; *third*, that it appears upon the face of the complaint that causes of action have been improperly united; and, *fourth*, that the complaint does not state facts sufficient to constitute a cause of action. So far as the first ground is concerned the demurrer is ineffectual. The plaintiff has legal capacity to sue, even though he may not have a cause of action. There is no defect in his appointment as administrator; or at least none appears upon the face of the complaint; consequently, he has capacity to sue. There is a decided difference between a capacity to sue and the right to maintain an action. (*Ward v. Petrie*, 157 N. Y. 301; *Leggett v. Stevens*, 77 App. Div. 612.)

The second ground is without foundation. There is no defect of parties plaintiff. The action is not founded upon the contract which is referred to in the complaint. It is founded upon the right of James F. Secor, as a surviving partner of the firm of Burgess & Secor, to receive the money which was realized from the government. James F. Secor was not made a party plaintiff for the reason that he refused to bring the action. He was, therefore, properly made a party defendant (Code Civ. Proc. § 448), assuming that the plaintiff has the right to maintain this action. Causes of action have not been improperly united. If the plaintiff can maintain the action as standing in the shoes of

James F. Secor, the surviving partner, and he, as is averred, was entitled to receive the whole of this fund, it is clear that he can maintain an action for an accounting of the same and have a recovery against all of the persons who acquired any part of it.

The fourth ground of demurrer proceeds upon the theory that the complaint does not state facts sufficient to constitute a cause of action, and this presents the serious question upon these demurrers. It is evident that the legal title to all of the personal property of the firm vested in the surviving partner. He had and has the sole and exclusive right to liquidate and deal with such property for purposes of liquidation as fully and completely as could the partners themselves. Being so vested with the legal title, the cause of action was in him solely and exclusively. He alone could enforce the collection of choses in action, pay debts and liquidate the affairs of the firm. Such relation is not that of trustee of the personal representatives of the deceased copartners, although it partakes somewhat of that nature. The personal representatives of a deceased partner have an equitable right to have the assets of the partnership applied to the payment of firm debts and to the distribution of any surplus. (*Williams v. Whedon*, 109 N. Y. 333.) It is stated in the syllabus of that case: "The time, manner and mode of paying the firm's indebtedness, however, is under the exclusive control of the survivors." This is, perhaps, too broad a statement of the law, because if the survivor had absolute control as to the time when he would liquidate he could not be called upon to account. The right is of a reasonable time in which to liquidate the affairs of the firm. In *Preston v. Fitch* (137 N. Y. 41) this case is cited with approval, and the rights of the representatives of the estate of a deceased partner as against the surviving partner are stated. So stated, it is the right of the personal representative to call the surviving partner to account. Undoubtedly an action upon a proper state of facts will lie against the surviving partner at the instance of the representatives of a deceased partner for an accounting, not as to any specific or particular thing, but as to all of his transactions as surviving partner and liquidator. The complaint in this case, however, is not based upon such theory. The theory of this complaint is that a cause of action exists in favor of Secor, as surviving partner, against the persons who have possessed themselves of this fund without right

to hold the same as against him, and the plaintiff seeks to place himself in Secor's shoes and enforce this cause of action, based upon the theory that Secor has refused to bring such an action, has released the claim without consideration and that thereby this fund will be lost to the partnership of which he is the survivor unless the right to maintain this action is upheld. We think he must fail, for the reason that he does not show himself possessed of any beneficial interest in this fund, and he, therefore, has no standing to maintain the action to enforce a cause of action which is vested solely and exclusively in the surviving partner. The interest and the sole interest of the personal representative is in the surplus which remains of the firm's assets after the payment and discharge of all of its obligations to creditors. Until that time arrives he has no beneficial interest whatever in the property. In order to secure his right in this respect he may have an action against the surviving partner, calling him to account, but he has no right to enforce claims and maintain actions to reduce to possession the assets of the partnership. It may be that an action can be maintained, based upon averments showing fraud, wasteful mismanagement and disregard of the rights of deceased partners. In such case personal representatives may maintain an action for an accounting and obtain the appointment of a receiver of the partnership assets, and upon the appointment of such receiver a cause of action may be vested in him to enforce the claim which is sought to be enforced in this action, but the plaintiff as personal representative has no such right. The complaint is destitute of any averment showing that the property of the firm is sufficient to pay all the debts and obligations of the copartnership, and until such event occurs plaintiff has no interest whatever as the personal representative of a deceased partner, as he has no more interest in the property of the copartnership, which is required to pay the debts of the copartnership, than any other stranger, so that it nowhere appears that he has the slightest beneficial interest in this fund. In the face of this fact plaintiff asks that an accounting be had of the specific fund; that it be decreed upon such accounting the sum to which the surviving partner would be entitled and that it be paid over to the plaintiff. If this should be granted it would not settle the copartnership affairs; there would be no liquidation of the firm's accounts, and the liquidator would

not be authorized to receive the fund. And this may be the result, although the personal representative has no interest whatever in this fund. Evidently the plaintiff is vested with no such right, and, consequently, the complaint fails to state a cause of action. This is for two reasons: *First*, that he has no right to maintain an action which is solely vested in the surviving partner; *second*, that he has not shown himself entitled to an accounting against the surviving partner. If he could in any view maintain this action, he would be required to show some beneficial interest which he has in this fund, and that will only arise when it is shown that there are no creditors of the copartnership remaining unpaid and that there is a surplus for which the surviving trustee should account. In that surplus and in that alone he would have a beneficial interest.

The interlocutory judgment should, therefore, be reversed, and as it is evident that plaintiff cannot succeed in this action, the complaint should be dismissed, with costs to the appellants.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed and complaint dismissed, with costs to appellants.

CLARA A. GALLOWAY, Appellant, v. J. ARMOUR GALLOWAY,
Respondent.

Action for divorce — what circumstances tend to show collusion justifying the court in refusing to confirm a report in plaintiff's favor — opportunity to the plaintiff to disprove collusion.

On the hearing of a motion to confirm the report of a referee authorizing the entry of a judgment of absolute divorce, it is the duty of the court to examine the testimony, and, although the reference was to hear, try and determine, it may refuse to confirm the report unless it is satisfied upon the whole case that the divorce should be granted.

On such a motion it appeared that the evidence satisfactorily established the commission of the offense by the defendant and that the plaintiff, when sworn as a witness, denied that the action was brought through connivance, privity or procurement. It further appeared, however, that the defendant had interposed an unverified answer denying the commission of adultery and that he offered no testimony in his defense and did not cross-examine the plaintiff's witnesses

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except in some slight particulars which rather tended to strengthen the plaintiff's case than to show a defense; that at the close of the hearing, the attorneys for the respective parties entered into a stipulation providing for the amount of the temporary alimony, the time at which it should be payable and that the amount thereof should be made permanent.

Held, that the circumstances tending to show collusion were sufficiently strong to justify the court in refusing to confirm the report; that the court should either itself take testimony or send the case back to the referee, in order to afford the plaintiff an opportunity to show that there was, in fact, no collusion.

INGRAHAM, J., dissented on the ground that the court should have confirmed the report.

APPEAL by the plaintiff, Clara A. Galloway, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of January, 1904, denying the plaintiff's motion to confirm the report of a referee in an action for divorce, *a vinculo matrimonii*.

Charles A. Molloy, for the appellant.

HATCH, J. :

The evidence adduced before the referee was sufficient to sustain the averments of the complaint, and in the absence of collusion between the parties it justified the findings of fact and conclusions of law which were made and authorized a judgment of divorce absolute as reported by the referee. By the provisions of section 1229 of the Code of Civil Procedure such judgment may not be rendered until the testimony and other proceedings upon the reference are certified to the court by the referee with his report, and judgment can only be rendered by the court. On the hearing upon the motion to confirm the court is required to examine the testimony, and although the reference is to hear, try and determine, the court may refuse to confirm the report unless upon the whole case it be satisfied that the divorce should be granted. The reasons for such holding are fully and satisfactorily set forth in *Goldner v. Goldner* (49 App. Div. 395) and *Gorham v. Gorham* (40 id. 564). While the evidence was satisfactory in establishment of the commission of the offense by the defendant, yet there are many circumstances which appear in connection with the method adopted to obtain evidence of the fact of its commission and of circumstances

which occurred during the course of the trial before the referee which are quite sufficient to raise the suspicion of collusion between the parties to obtain the judgment of divorce. While the defendant interposed an answer denying the averments of the complaint respecting the commission of adultery, yet it was unverified, and upon the trial no cross-examination of the witnesses was made by the defendant's attorney save in slight particulars which rather tended to elicit information strengthening the plaintiff's case than to show a defense. The referee examined the witnesses upon pertinent subjects at considerable length, and in so doing satisfactorily discharged his duties in the execution of the reference. The defendant offered no testimony in his defense. At the close of the hearing before the referee the attorneys for the respective parties entered into a stipulation providing for the amount of temporary alimony to be awarded, the time at which it should be payable and that the amount thereof should be made permanent, and the referee was authorized to pass upon and award the sum in his report. The plaintiff was sworn upon the trial and answered the formal questions respecting connivance, privity, procurement, etc., and denied the same. There is no evidence to show that she was in anywise connected with or took part in procuring the testimony upon which the report was based. On the contrary, it satisfactorily appears that the steps which were taken to procure such evidence were had through the instrumentality of a gentleman of character and standing. If the suspicious circumstances, to which we have adverted, tending to show collusion had been absent, the report of the referee would doubtless have been confirmed and judgment directed to be entered thereon in conformity to law. We are of opinion, however, that the circumstances were sufficiently strong respecting the collusion as to justify the court in refusing to confirm the report. If, however, there was in fact no collusion some opportunity should have been afforded to the plaintiff to show the same. The order denies confirmation of the report and makes no other disposition of the matter. Under the circumstances of this case we think that the learned court should have given the plaintiff an opportunity to present proof either before itself or by sending the case back to the referee to take proof and report further upon such subject. As the matter now stands the plaintiff may doubtless take further

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proceeding in the case bearing upon the subject of the issues. Such was the intimation of the court in *Goldner v. Goldner* (*supra*), but in ordinary course it should be with respect to some direction made by the court at Special Term.

We conclude, therefore, that the order appealed from should be affirmed, with leave given to apply at Special Term for leave to take such further proof and proceedings in the action as the plaintiff shall be advised; no costs of this appeal allowed to either party.

VAN BRUNT, P. J., O'BRIEN and McLAUGHLIN, JJ., concurred; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

I think that upon the evidence before the referee the plaintiff was entitled to judgment.

Order affirmed, without costs, with leave to plaintiff to apply to Special Term for leave to take further proof, etc.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOSEPH B. C. TUELL, Appellant, v. JOHN OVERTON PAINE, Respondent.

In the Matter of the Application of JOSEPH B. C. TUELL, Appellant, for the Examination of IGNATIUS L. QAULEY.

JOHN OVERTON PAINE, Respondent.

Contempt proceedings — the testimony of a witness should be taken, not before a referee, but before the court — his attendance required by subpoena or order.

Where the testimony of a witness is material in a proceeding to punish a judgment debtor for contempt, because of the alleged violation by the latter of an injunction clause, contained in an order for his examination in proceedings supplementary to execution, the judgment creditor is not entitled to an order appointing a referee to take the witness' testimony.

Such testimony may be taken directly in the contempt proceeding itself, and the witness may be compelled to attend before the court on such proceeding either by subpoena or by an order under the provisions of section 2280 of the Code of Civil Procedure.

APPEAL, in each case, by Joseph B. C. Tuell, from an order of the Supreme Court, made at the New York Special Term and

entered in the office of the clerk of the county of New York in the first above-entitled action on the 19th day of October, 1903, denying the relator's motion for an order appointing a referee to take the testimony of John Overton Paine and one Ignatius L. Qualey, and in the second above-entitled proceeding on the 14th day of October, 1903, denying the petitioner's motion for an order appointing a referee to take the deposition of the said Ignatius L. Qualey.

Henry W. Hardon, for the appellant.

George R. Bristor, for the respondent.

HATCH, J.:

Joseph B. C. Tuell recovered a judgment against J. Overton Paine in the sum of \$2,296.15. Execution was issued thereon and returned unsatisfied. Paine appeared before a referee in proceedings supplementary to execution. The order for such examination contained the usual provision prohibiting the judgment debtor from in anywise disposing of any of his property which was not exempt from levy and sale under an execution. Paine first appeared before the referee on April 13, 1903, at which time he applied for an adjournment. The referee thereupon asked him if the order served upon him contained the usual stay, to which Paine's counsel replied that it did. Upon April sixteenth Paine reappeared before the referee, at which time he testified that he had upon that morning made an assignment of all his property for the benefit of his creditors, and that his counsel, Mr. Galloway was the assignee. An attachment was thereupon issued, and Paine was arrested for a contempt of court. Paine gave bail, and upon the hearing on the return of the attachment he denied the alleged contempt, and interrogatories were thereupon settled, to which he was directed to reply. One of these interrogatories was as follows: "Did the value of your property so transferred by you to Mr. Galloway exceed the sum of \$2,500? If you say no to this interrogatory, annex to your answer a schedule of all the property so transferred by you, * * * and state in connection with each piece of property what its value was * * *." To which said Paine made answer in substance as follows: That the value of the property assigned by him did not

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exceed the sum of \$2,500. That he assigned property of no value not exempt from seizure on execution and that he could not make a schedule of the property so assigned. The judgment creditor was informed that in February, 1903, Paine had loaned to one Qualey \$2,000 or more, and that the same had not been repaid to Paine at the time of the assignment, and that Qualey was solvent and abundantly able to repay the same. Qualey refused to make affidavit to such facts, but stated that they were true. The appellant contends that the truth as to these facts should be ascertained in order to punish Paine for a contempt of court he having testified that he had not assigned anything of value. Thereupon the appellant made an application for an order to take Qualey's deposition before a referee under section 885 of the Code of Civil Procedure. This application was made before Mr. Justice BLANCHARD before whom the contempt proceedings were pending. The motion was denied, the learned judge stating: "The plaintiff has the right under section 2280 of the Code to produce affidavits or other proofs contradicting any answer, and I do not believe that any such purpose would be served by a reference." The order entered thereon provided that the denial of the motion should be without prejudice to any application which the relator might make herein on further papers. Subsequently the plaintiff made the motion in the proceeding first above entitled at Special Term and the motion was again denied, not for want of power, but in the exercise of discretion. Some question having been raised as to whether the motion could be granted in a special proceeding under the provision of section 885 of the Code of Civil Procedure, the plaintiff thereafter made a motion upon a different set of motion papers, entitling the same as in an action wherein the judgment creditor was made relator, and upon these papers a motion was made for the same relief and the disposition of such motion was the same as in the other proceeding. The appeals herein are from the orders denying the motion entered in each case.

No leave was necessary to make the first motion as the order of Mr. Justice BLANCHARD reserved in the party the right to make the same, and no leave was necessary in the second case, because it was made upon different papers and in an action differently entitled, but we think it was proper to deny the motion in each case. The plaintiff

is undoubtedly entitled to procure the deposition of Qualey, and the facts which appear show that his deposition is material in the contempt proceeding. His testimony, however, could be taken directly in the proceeding itself and the witness could be compelled to appear before the court upon such proceeding, either by subpoena or order under the provisions of section 2280 of the Code of Civil Procedure. That section authorizes a party upon the hearing for contempt and on the return to the interrogatories to produce affidavits or other proofs, and all that was necessary for the plaintiff to do was to take steps for the production of Qualey in court upon that proceeding when this testimony could be given.

It follows that the orders should be affirmed, with ten dollars costs and disbursements in each case.

INGRAHAM, McLAUGHLIN and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., concurred in result.

Order affirmed, with ten dollars costs and disbursements in each case.

JOHN J. A. RYAN, Respondent, v. THIRD AVENUE RAILROAD COMPANY, Appellant.

Negligence — injury to an employee while in a pot hole between the rails of a street railway — the company is not liable for the failure of a competent foreman to warn the employee of the approach of a car — assumption of risk.

In an action brought to recover damages for personal injuries it appeared that the defendant owned a street railroad operated by a cable; that it was necessary from time to time to oil and replace the wheels upon which the cable ran; that in order to do this work it was necessary for the oilers to go into openings, called pot holes, located between the rails under the surface of the street; that a foreman of the defendant was employed as an oiler, and that the plaintiff was employed as the foreman's helper, and in the performance of his duties was subject to the foreman's directions; that when a workman was in a pot hole it was necessary that some person should stand guard near the hole, to prevent trucks from driving into it and to warn the workman in the hole of the approach of cars in time for him to get out of the hole and enable them to pass; that the foreman and the plaintiff alternated in going into the pot hole and in standing guard; that on the occasion of the accident the plaintiff was working in a pot hole which, as claimed by him, was too small to permit him to remain therein while a car was passing over it, and that in consequence of the failure of the

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foreman, who was standing guard, to warn the plaintiff of the approach of a car, the latter was struck by the car while attempting to come out of the hole. The foreman was a competent person to guard the hole.

Held, that when the defendant had stationed a competent person to guard the hole while the plaintiff was working therein, it had discharged its entire duty with respect to the plaintiff, and that it was not liable for the failure of the foreman to warn the plaintiff of the approach of the car;

That the plaintiff assumed, among the other risks of the employment, the risk that the foreman might become inattentive, careless and neglectful of his duties and omit to give the warning when required.

APPEAL by the defendant, the Third Avenue Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 7th day of July, 1903, upon the verdict of a jury for \$3,500, and also from an order entered in said clerk's office on the 1st day of July, 1903, denying the defendant's motion for a new trial made upon the minutes, and granting the plaintiff's motion for an extra allowance.

Bayard H. Ames, for the appellant.

Frederick W. Block, for the respondent.

HATCH, J. :

This action is brought to recover damages for injuries claimed to have been received through the negligence of the defendant. The plaintiff was in the employ of the defendant as a helper to one Short, a foreman of the defendant employed as an oiler. It was the duty of these men to oil the wheels which carried the cable, the motive power of the car, beneath the surface of the street, and also to repair the same and to put in new wheels when required. In the performance of his duties the plaintiff was subject to the directions of Short, the foreman. In order to do the work it was necessary to go into an opening called a "pot hole," located between the rails and underneath the surface of the street. It was claimed upon the part of the plaintiff, and evidence was given in support of the claim, that the "pot hole" was not large enough to permit him to remain therein during the passage of a car; that he was required to place his head and body below the surface of the street during the performance of his work, in consequence of which he was not able to

protect himself from passing cars and other vehicles upon the street. In order, therefore, to render the place safe during the performance of the work it became necessary that some person should stand near the hole to prevent trucks from driving into it, and to warn the plaintiff of the approach of cars in time for him to get out of the hole and enable them to pass. While Short was the foreman and the plaintiff was subject to his direction, yet they alternated in going into the hole and performing the duties required therein. When plaintiff was in the hole Short watched to warn vehicles, and also to warn the plaintiff of the approach of the car, and plaintiff performed the same service when Short was in the hole. On the 2d day of July, 1897, the plaintiff and Short were engaged in putting in a new wheel on Third avenue, near Sixth street. Plaintiff was in the hole and Short was standing guard. The cars were running on about a minute headway. Plaintiff testified that he had been in the hole several minutes, had not received any warning of approaching cars, and having a premonition that he ought to receive such warning concluded to get out of the hole without it. As he got up he saw a car approaching at full speed ten or fifteen feet away; that he attempted to jump from the hole; the car caught him before he could leave the track, inflicting the injuries of which he makes complaint. Upon the part of the defendant it was claimed that the hole was sufficiently large for a person to remain therein during the passage of a car; that no warning was required of its approach, but that a guard was necessary for the purpose of keeping other vehicles passing on the street away from the hole and of informing the person therein when it was necessary for him to come up that it was safe so to do; that upon the occasion in question Short was present attending to his duties, and that the plaintiff, without giving any notice and when a car was close upon him, arose from the hole; that Short called to him to get back; plaintiff failed to obey the direction and attempted to get out, when he was caught by the car. In general these were the two features presented by the evidence in the case. It is a question of some doubt as to whether the verdict can be supported upon the evidence if it rests upon the size of the hole. It appeared without dispute that these holes were uniform in size; their dimensions were given, and from them it seemed to leave space sufficient for a person to remain in

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the hole without liability to injury during the passage of a car. The size of the hole seems to demonstrate such condition as a physical fact, and if so, liability could not be predicated upon failure to warn of the approach of a car, unless the person was ready at the time to leave the hole, when warning as to safety would be required.

We do not, however, rest our decision upon this ground, as we think error was committed in the submission of the case to the jury which necessarily requires a new trial. Among other things, the court charged: "I have decided, however, to present this case to you upon the theory that, if certain facts are established to your satisfaction, the master could not delegate certain duties to Mr. Short in this case which I will later explain so that you may not misunderstand what I am aiming at. Any act of omission which was incumbent upon Mr. Short, upon a certain aspect of the case, would be one for which the defendant would be answerable. If it were not for that fact, gentlemen, the plaintiff would not have a case." The court then proceeded to charge that if the "pot hole" was not of sufficient size to enable the plaintiff to keep his entire body under the level of the street, a duty was devolved upon the defendant to take such precautions as would insure plaintiff a safe place to work, and that it was incumbent upon the defendant in order to make the place safe to have some one to warn the plaintiff of the approach of a car and warn away other vehicles. The court then stated: "So that, you see, the crucial point of the case is, was the place where the plaintiff was working at the time such a place that he could not get his entire body within that opening underneath the level of the street?" The court then submitted the question as to whether the plaintiff was in such position as to be cognizant himself of approaching danger, and if so, that he was bound to take heed of it and avoid it if possible, in order to relieve himself of contributory negligence. The court then charged upon the subject of the warning required, based upon the respective theories of the parties, and said, in that connection: "I think it is proper to say to you that as the case is presented, I do not think the question of warnings has really much to do with this case." The court then charged that when a person is engaged in a business which is dangerous and hazardous the law imposes upon him the assumption of

the obvious risks of the employment, and that if the master has discharged all the duty resting upon him and an accident happens through no fault in this respect, but because the work itself is dangerous, there exists no liability upon the part of the master. And finally the court charged: "If you find, gentlemen, in this case, therefore, to sum up, that the accident happened solely through the negligence of the defendant, because of a failure on the part of Mr. Short to warn the plaintiff, and because you believe from the facts that the plaintiff could not have worked under any other conditions than those which would have compelled him to keep his body beneath the level of the ground, and would not have permitted him to see an approaching car unless somebody warned him; if you believe that, and if you also believe that the plaintiff did not, by any act of his, contribute to this accident by any negligent act, then you have a right to find for the plaintiff, otherwise, for the defendant."

To these several quoted portions of the charge the defendant excepted and it requested the court to charge: "If it was the duty of the foreman Short to give warning of the approach of the car, and if his failure to give such warning was the cause of the accident, then such failure on his part is the negligence of a fellow servant of the plaintiff and not of an *alter ego* of the defendant, and your verdict in that event must be for the defendant." The court refused so to charge and the defendant excepted. Upon the motion for a new trial the court held that Short was the *alter ego* of the defendant; that its duty extended not only to providing a competent person to stand guard and give warning as the circumstances required, but that the duty extended to the performance of the act of warning, and, therefore, that the defendant could not relieve itself from liability by providing a competent person, but was likewise responsible for the manner in which he performed his duties. Under the submission by the court, the evidence justified the jury in finding that the hole was too small for the plaintiff to remain in the same during the passage of a car, and finding this fact they were instructed that the duty of the master was to provide a safe place commensurate with the dangers to be encountered and that the obligation resting upon the master was not only to provide a safe place but to see that it continuously remained safe, even to the detail of giving the warning which the circumstances required. It is evi-

dent, therefore, that the obligation which was imposed upon the master by the charge was that of insuring the safety of the plaintiff during the performance of his work. The obligation which rests upon the master in respect of the place where the servant is to perform his work is to provide a reasonably safe place in which to prosecute the same considering the nature of the service in which the employee is engaged. When he has discharged that obligation it meets all the requirements of the law, and there is no liability imposed upon the master for injuries which result to the servant proceeding from the manner of the performance of a detail of the work. (*Ward v. Naughton*, 74 App. Div. 68.) The servant assumes, in entering upon his employment, all of the risks incident thereto and of all dangers which are open and obvious. (*Crown v. Orr*, 140 N. Y. 450.) In the present case the plaintiff had full and complete knowledge of the situation. He knew the character of the work and the place where he was to perform it. He knew the dangers to be apprehended and guarded against. He was informed concerning the approach of the cars and the general course of management of other vehicles upon the street. He was aware that proper protection in his employment required that somebody should be placed to warn him of approaching danger which he was unable to observe. Under these circumstances he had the right to expect and also to demand from the defendant a provision for warning which would insure a reasonably safe place, considering existing conditions. The plaintiff was informed that the defendant had undertaken the discharge of this obligation by appointing a competent person to guard the place where he worked and so make it safe. After such provision was made he entered voluntarily upon the performance of his duties. The defendant having discharged towards him every obligation which the law imposed upon it, could not be charged with the neglect of the person stationed to give the warning in failing to give it, unless the rule of liability be so far extended as to make the defendant an insurer of plaintiff's safety. This obligation it did not assume; nor does the law impose it. The defendant having discharged the obligation which the law imposed, the plaintiff must be deemed to have assumed the risks incident to that situation, among which was the risk that the person placed to warn him of danger might become

inattentive, careless and neglectful of his duties, and omit to give the warning when required. In *Cullen v. Norton* (126 N. Y. 1) the court, through Judge PECKHAM, said: "But the manner of the performance of each of the various details of the work by which, as a whole, it was to be conducted, rested necessarily upon the intelligence and care and fidelity of the servants to whom these duties were intrusted. It can't be that every time a blast was exploded and the men came back, the manner of their distribution for work was a duty of the master, and that the order of a foreman, mistakenly or negligently given, must be regarded as the order of the master in filling a duty to furnish a safe place to work in. It is, as it seems to me, a detail of the working or management of the business, the risks attending which have been assumed by the party taking employment." This language finds precise application to the facts of this case and is controlling of it. Its doctrine has never been questioned, but, on the contrary, has been repeatedly reaffirmed by the Court of Appeals (*Perry v. Rogers*, 157 N. Y. 251) and in the Supreme Court (*Ulrich v. N. Y. C. & H. R. R. Co.*, 25 App. Div. 465) and in numerous other cases. In assuming the risk of this situation the person selected by the master to perform it, if he be competent in all respects to discharge it, stands in relation to the plaintiff, no matter what be his grade, as a coservant, and for his act of negligence the master is not responsible.

The court below relied upon *Hankins v. N. Y., L. E. & W. R. R. Co.* (142 N. Y. 416). The neglect in that case was of a train dispatcher in ordering the movements of two trains which resulted in their collision, whereby a servant was injured, and it was held that in the discharge of that particular duty it was the master who acted. The train dispatcher controlled the entire situation with respect to the movements of the trains, was acquainted with and controlled the schedule by which they moved. This was the particular business of the master and its performance could not be delegated. The act itself created the condition which made the place unsafe, and, under such circumstances, the master may not shelter himself from responsibility behind the act of the servant. The distinction between that case and the present is pointed out in *Savage v. Nassau Electric R. R. Co.* (42 App. Div. 241; *affd.* on appeal, 168 N. Y. 680).

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The court was, therefore, in error in charging that the failure of Short to warn the plaintiff was the act of the master, which could not be delegated, and the defendant was entitled to the charge upon that subject which it requested.

It follows that the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

GEORGE H. GILLETTE, Appellant, Respondent, v. HORATIO T. NOYES and Others, Respondents, Appellants.

Injunction sought by a majority stockholder, restraining the directors of a corporation, minority stockholders, from holding a special meeting or disposing of its assets—the complaint and moving affidavits verified on information and belief, not stating the sources thereof, are insufficient.

The plaintiff in an action will not be granted a temporary injunction where the allegations of the complaint and the statements contained in the moving affidavit are made either upon the plaintiff's understanding or upon his information or belief, and neither the basis of his understanding nor the sources of his information nor the grounds of his belief are stated.

The defect is not cured by a joint affidavit of other persons, which, when applied to the allegations of the complaint and to the plaintiff's affidavit, merely operates as an averment that it is true that the plaintiff's understanding, information and belief are as alleged and stated.

When, in an action brought by a person owning a majority of the stock of a corporation against the corporation and certain individuals, who, although minority stockholders, constitute a majority of the board of directors of the corporation, a temporary injunction should not be granted restraining the individual defendants from holding a special meeting of the board of directors, and from disposing of any of the assets of the corporation until the final determination of the action, considered.

CROSS-APPEALS by the plaintiff, George H. Gillette, and by the defendants, Horatio T. Noyes and others, from portions of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 15th day of December, 1903, as resettled by an order entered in

said clerk's office on the 21st day of December, 1903, granting a temporary injunction.

The relief demanded in the complaint is an injunction restraining the defendants individually and as officers and directors of the defendant corporation "and any and all other person and persons" from holding a special meeting of the board of directors of the defendant company on the 30th day of November, 1903, and from disbursing any of the assets of the company, including its capital stock, "and from holding any meeting or meetings whatsoever pursuant to any alleged authority claimed to be vested in them or either of them; or in any manner interfering with the assets, capital or treasury stocks, patents, franchises or other property of the defendant corporation," or interfering with the company or the rights of the plaintiff and other stockholders therein "until the final judgment and decree in this action, and for such other and further relief in the premises as may be just and equitable, besides the costs and disbursements of this action." The plaintiff alleges that the defendant company was incorporated under the laws of the State of Maine; that he owns or controls the majority of the capital stock issued and outstanding; that the individual defendants are directors of the company and constitute a majority of the board; that the individual defendants received their stock upon the understanding that they would promote the interests of the company and procure for it sufficient money to bring about the success of the patents which it owns, but that instead of doing so they "have repeatedly taken such steps and measures as would bring upon the said corporation financial disaster;" that at a conference of the board of directors it was agreed that the number of directors should be increased from five to seven, and that from among the stockholders of the company two new directors should be elected who would "insure the procurement of capital very necessary to the welfare" of the company; that, acting upon this understanding, the plaintiff on the 25th day of November, 1903, caused notice of a special meeting of the stockholders for that purpose to be mailed to each stockholder; that it was understood and agreed "that the corporation would continue as it was, without hindrance or molestation from any of the directors or stockholders" until such special meeting, but, notwithstanding such understanding, and in violation of

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the by-laws, the individual defendants, "with the avowed purpose of transferring and illegally disposing of the treasury stock, assets, franchises and patents" of the company, have called a special meeting of the board of directors for the 30th day of November, 1903, and if the meeting be held "this plaintiff is informed and verily believes that the patents, assets, franchises, property rights and treasury stock of the said corporation will be disposed of, and said defendants threaten to and are about to dispose of the same, without any consideration, to the detriment and injury of the defendant corporation and the irreparable loss to the stockholders thereof;" that the plaintiff is the president, and the by-laws provide that special meetings of the board of directors shall be called by the president; that "this action is brought for the purpose of restraining the holding of said special meeting, and to prohibit the fraudulent transfer of the company's stock or assets, in the belief that if the stock of the said defendant corporation is so disposed of the said stockholders will have no adequate remedy at law * * * as these defendants, as this plaintiff is informed and believes, would be unable to respond to a judgment for damages." The order, among other things, enjoins the company, its officers, directors and stockholders "from disposing of the assets or property" of the company, including its capital stock, and from holding any meetings whatsoever, and "from in any manner interfering with the assets, capital or treasury stock, patents, franchises or other property" of the company, and "from in any way interfering with" the company or the rights of the plaintiff and other stockholders therein.

The plaintiff appeals from so much of the order as enjoins a meeting of the stockholders; and the defendants appeal from the rest of the order. The affidavit of the plaintiff states that the purpose for which the company was organized was to further a patent invented by him for a cap on bottles, and that in his opinion the invention is of great value; that the individual defendants induced him to turn over to them certain capital stock upon representations that they would interest capitalists in the company, which they have not done; that it was recognized by all that the company was in need of capital, and with that end in view it was agreed that the board of directors should be increased from five to seven substantially as stated in the complaint; that it was his understanding — but he

does not say from what he derived the understanding—that the company would not be interfered with until the special meeting of the stockholders for the purpose of increasing the directors, “but I am now informed that in utter disregard of said understanding and with the deliberate purpose of injuring the company and disposing of its treasury stock, assets, patents and property holdings,” the individual defendants as stockholders and directors have called a special meeting of the board, as stated in the complaint, “at which they intend to dispose of the said treasury stock and the assets of the said corporation before the special meeting of the stockholders can be had.” The plaintiff also presented a joint affidavit made by three individuals to the effect that the matters alleged in the complaint and in his affidavit are true, and that they have had numerous interviews and conferences with two of the individual defendants, “and from what they told us we believe and know that they intend to transfer, without any consideration, the treasury stock of the said corporation, as well as to injure the said company at the special meeting of the directors they have illegally called.” An affidavit made by each individual defendant was presented in opposition to the motion showing that the special meeting of the board of directors was called for the sole purpose of considering the advisability of retaining in the employ of the company a brother of the plaintiff whose term of service expired on the day for which the meeting was called; that at the time for which the meeting was called a conference was held without a formal meeting of the board, and a satisfactory arrangement was made with reference to continuing the services of the plaintiff’s brother, which rendered it unnecessary to hold the meeting, although no injunction had been served and the individual defendants had no knowledge that it had been obtained; that the entire capital stock of the company was issued to the plaintiff in consideration of a transfer of certain letters patent upon the understanding, however, that he was to turn over to the corporation capital stock of the par value of \$200,000, which was to be sold by the corporation to provide funds for the purpose of promoting the patent, and that he was also to turn over capital stock of the par value of \$200,000 to the defendant Noyes and a like amount to the defendant Horace O. Stripe, and retain capital stock of the par value of \$400,000 for himself; that this agree-

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ment for the distribution of stock was consummated; that the company's only means of raising funds at present is by a sale of this treasury stock; that part of the treasury stock has been sold from time to time, but that the company is now in pressing need of funds for the purpose of completing and perfecting a machine for the purpose of demonstrating the practicability of the patent to enable them to make contracts with brewers for the use of the machine; that it is the custom of brewers to make their contracts on or about the first of January. Each of the individual defendants denies any intention to sell any property of the corporation other than its treasury stock, which they deem it necessary to sell as heretofore for the purpose aforesaid.

John P. Everett, for the plaintiff.

Daniel P. Hays, for the defendants.

LAUGHLIN, J. :

As is shown by the statement of facts, the plaintiff makes no demand for any permanent relief which a court of equity may decree, and, therefore, there is no authority for granting a temporary injunction in this case where the right thereto depends upon the nature of the action. (Code Civ. Proc. § 603.) The allegations of the complaint and the statements contained in his affidavit so far as they set forth facts charging any improper management on the part of the directors are either made upon his understanding or upon information or belief, and neither the basis of his understanding nor the sources of his information nor the grounds of his belief are stated. This defect is not cured by the joint affidavit which, when applied to the allegations of the complaint and to the plaintiff's affidavit, merely is to the effect, so far as these matters are concerned, that it is true that plaintiff's understanding, information and belief are as alleged and stated. The injunction order has had the effect of completely tying the hands of the board of directors, and it appears, as might be expected, that the business of the company is at a standstill in consequence thereof. The provision of the order enjoining special and annual meetings of the stockholders, of which the plaintiff complains, is drastic; but it was evidently imposed as a condition of awarding that part of the injunction

which the plaintiff desired. It is evident that there is a serious disagreement between the plaintiff, who owns or controls a majority of the outstanding stock, and the individual defendants who, although minority stockholders, constitute a majority of the board of directors. It is manifest that the plaintiff's object in bringing the action was not to obtain a permanent injunction, but to temporarily enjoin the board of directors from selling sufficient treasury stock to render him a minority holder of the outstanding stock and prevent his controlling the next election of directors. This would be accomplished by the temporary injunction order restraining further sales of stock until after the special meeting of the stockholders to increase the number of directors at which, by reason of his controlling interest in the outstanding stock, he could secure the election of two individual directors friendly to his interests.

We are of opinion that the plaintiff was not entitled to the temporary injunction order, and that the order, in so far as it is appealed from by the plaintiff, should be reversed, and, in so far as it is appealed from by the defendants, should be reversed, thus vacating the entire order, without costs of the appeal to either party, and that the motion should be denied, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Order, so far as appealed from by plaintiff, reversed, and so far as appealed from by defendant, reversed, without costs of appeal to either party, and motion denied, with ten dollars costs.

LINCOLN NATIONAL BANK, Appellant, v. CARL FISCHER-HANSEN,
Respondent.

Continuing guaranty of the payment of notes — terminated by notice of revocation — proof of the advice of an attorney and of a prior declaration of an intention to revoke it is incompetent.

If a person, who guarantees the payment of certain notes and of any renewals thereof, prior to the renewal of any of the notes, revokes the guaranty and notifies the bank, to whom the guaranty was given, to insist upon payment of the original notes at maturity, he will not be liable upon renewal notes thereafter accepted by the bank.

Where the guarantor interposes this defense in an action brought against him by the bank upon a renewal note, and the bank denies having received notice of the revocation of the guaranty, it is improper to permit an attorney to testify that on the day the original notes fell due the guarantor consulted him in regard to his liability upon the guaranty and that he advised him to go at once to the bank and revoke his guaranty, for the purpose of corroborating the guarantor's testimony to the effect that after this interview with his attorney he went to the bank and gave the notice of revocation.

Such evidence is not competent under the rule that, when the testimony of a witness is attacked or sought to be impeached upon the ground that it is false and has been induced by a motive disclosed by the evidence, it may be shown to sustain his credibility that he made similar declarations at a time when no motive existed for falsifying.

The testimony of a witness that he did a certain thing cannot be corroborated by the testimony of another to whom he had previously declared his intention of doing it.

APPEAL by the plaintiff, the Lincoln National Bank, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 12th day of May, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 12th day of May, 1903, denying the plaintiff's motion for a new trial made upon the minutes.

David Gerber, for the appellant.

John R. Dos Passos, for the respondent.

LAUGHLIN, J. :

On the 2d day of October, 1901, the defendant signed and delivered to the plaintiff a guaranty in writing of the payment at maturity of any note or notes made by Paul Bertin and his wife, or either of them, to the extent of \$5,000 and renewals thereof. On the twenty-second day of May thereafter Bertin and his wife made their promissory note whereby they promised to pay for value received three months after date to the order of themselves \$1,000, and before maturity for value indorsed and transferred the same to the plaintiff. The plaintiff in purchasing and discounting the note relied upon the defendant's guaranty. This note was not paid at maturity, although payment was duly demanded, and the note was protested for non-payment. The action is brought to recover of the guarantor the amount of the note together with interest. The

defense interposed was a revocation of the guaranty on the 5th day of May, 1902, or seventeen days prior to the making of the note. The question of fact litigated upon the trial was whether or not the guaranty was revoked. There was a sharp conflict in the evidence. The court instructed the jury that if the guaranty was revoked the plaintiff could not recover, but that otherwise the defendant was liable. This note was given in renewal of a note upon which the defendant was clearly liable under his guaranty.

Of course, if before the renewal the defendant revoked his guaranty and notified the bank to insist on prompt payments of the outstanding notes at maturity, the renewal released the defendant, and the bank must have overlooked the revocation or determined to extend the credit to the makers without other security. The defendant testified that on the 5th day of May, 1902, he called at the bank and "asked to see somebody in authority;" that a gentleman whom he now recognizes as Mr. Van Santford was called over, to whom the defendant introduced himself, and said that he had come to revoke his guaranty of the payment of some notes for Mr. and Mrs. Bertin, and said to Mr. Van Santford that "Henceforth, I will not be responsible for any new notes, or renewals or extensions; you must keep him to his payments;" that thereupon Van Santford excused himself for a moment and went back to an adjoining room and conferred with another gentleman who was seated at a roll top desk and then returned and said, "It will be all right, Mr. Fischer-Hansen," whereupon the defendant said, "Is it necessary for me to write?" to which Mr. Van Santford replied, "No, not at all." The defendant was corroborated by the testimony of his rent collector and office boy whom he asked to have accompany him to the bank. It appears that the defendant is an attorney. The plaintiff gave evidence tending to show that when Mr. Bertin first opened an account at the bank the defendant accompanied him and at this time they both asked for a line of discount of \$5,000; that the defendant shortly thereafter and before executing the guaranty upon which this action is based and before the discount was allowed wrote the cashier of the bank, saying that he would be willing to act as surety for Bertin to the extent of \$5,000, "the exact details of which I leave to you to arrange." Mr. Van Santford, who was the assistant cashier, testified in

behalf of the plaintiff. He conceded that early in May the defendant called at the bank and inquired of him when the next Bertin note would fall due, but he denied that anything was said concerning the revocation of the guaranty. Mr. Van Santford says that he referred the defendant to the discount clerk. Mr. Baird, the discount clerk, corroborated Van Santford in this regard and says that the defendant inquired of him as to the maturity of the different Bertin notes and said that he did not care to have the bank "renew them for any larger amount" and was assured that it would not.

The defendant then called as a witness in his behalf Mr. Kalish of the firm of Lindsay, Kremer, Kalish & Palmer, his attorney, who had been his counsel for sometime. Kalish was permitted to testify, under the plaintiff's objection and exception, that the evidence was incompetent, that the defendant consulted him with reference to this guaranty, saying that he had learned that Bertin was in failing circumstances and that the witness advised the defendant to notify the bank at once to insist upon full payment of the note and that he revoked the guaranty. The witness further testified that the defendant informed him that one of the notes was falling due on the day of the consultation and for this reason he advised the defendant to go personally to the bank at once instead of writing a letter. The defendant then testified that after this interview with his attorney he went to the bank and gave notice of revocation of the guaranty as already stated. This evidence was clearly incompetent. There is no rule of evidence that permits the testimony of a witness that he did a certain thing to be corroborated by the testimony of another to whom he previously declared his intention of doing it. The rule that when the testimony of a witness is attacked or sought to be impeached upon the ground that it is false and has been induced by a motive disclosed by the evidence, it may be shown to sustain his credibility that he made similar declarations at a time when no motive existed for falsifying, declared in *Herrick v. Smith* (13 Hun, 446); *Matter of Hesdra* (119 N. Y. 615); *Hawley v. Hawley* (48 App. Div. 301) and kindred cases has no application. The testimony of the attorney was of no probative force upon the question as to whether the defendant gave notice

to the assistant cashier of revocation of the guaranty as to the future. The interview between the defendant and his attorney may have taken place without his subsequently going to the bank at all. Therefore, the testimony of the attorney is no evidence either that the defendant subsequently went to the bank, or as to what he said upon arriving there.

It follows, therefore, that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

NELLIE M. COYLE, Appellant, v. SOLOMON DAVIDSON, Respondent.

Amendment of a complaint for damage from the overflow of water from an adjoining lot — terms imposed on the amendment of a complaint where a juror has been withdrawn on a trial — when the proposed amended complaint does not state a new cause of action.

The original complaint in an action to recover for injury done to the plaintiff's premises, caused by water flowing from defendant's premises, alleged that the injuries were caused by the "carelessness and negligence of the defendant," and demanded \$1,500 damages. Upon the trial, the court being of the opinion that the complaint did not state a cause of action, because it was to be inferred therefrom that the damage was caused by surface water, permitted the plaintiff, upon payment of the trial fee, to withdraw a juror and move at the Special Term for leave to amend the complaint. The proposed amended complaint alleged that the injury was caused by water percolating through the soil from defendant's premises, caused by the negligence of the defendant in failing to keep a waste pipe attached to the water closet in the rear of his adjacent premises in proper repair and to repair a break therein, and by failing to keep a wash basin in the rear of his premises in proper repair, and in negligently allowing a water pipe on his premises to freeze and burst. The proposed amended complaint further alleged that the defendant during a period of four months failed and neglected to repair these defects "and abate the nuisance maintained upon his said premises, although repeatedly requested so to do by plaintiff," and that during this period water kept constantly flowing into plaintiff's cellar, weakening, decaying and rotting the foundation walls of plaintiff's cellar and depriving plaintiff's tenants of the use of the cellar, in

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consequence of which her tenants left and plaintiff "suffered great loss of rents," and that plaintiff's damages altogether amount to \$5,000.

The damages which the plaintiff sought to recover under the proposed amended complaint were, except as to the amount, the same as those which she sought to recover under the original complaint.

Held, that the motion to serve the proposed amended complaint should be granted upon payment of ten dollars costs of the motion and all the taxable costs of the action except the trial fee;

That the proposed amended complaint did not state an entirely new cause of action, as it was apparent that a recovery under the original complaint would bar a recovery under the proposed amended complaint;

That the proposed amended complaint merely amplified the original complaint by setting forth more fully the grounds on which the defendant was liable and by demanding increased damages.

APPEAL by the plaintiff, Nellie M. Coyle, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of November, 1903, denying the plaintiff's motion for leave to serve an amended complaint.

William F. Burroughs, for the appellant.

John E. Ruston, for the respondent.

LAUGHLIN, J. :

The original complaint was for \$1,500 damages to plaintiff's dwelling and premises No. 396 Third avenue, in the city of New York, by water flowing from adjacent premises owned by defendant, upon which there was a building also owned by him, and near plaintiff's dwelling house, alleged to have been caused "by reason of the carelessness and negligence of the defendant." Issue was joined by the defendant's answer. The case was placed upon the calendar and moved for trial. Counsel for defendant moved to dismiss the complaint, at the opening of the trial, on the ground that it did not state facts sufficient to constitute a cause of action, claiming that it was to be inferred from the complaint that the water which caused the damage was surface water, for which no liability existed under the authority of *Vanderviele v. Taylor* (65 N. Y. 341) and *Lynch v. Mayor* (76 id. 60). The court evidently adopted that view, and upon counsel for the plaintiff requesting leave to withdraw a juror and to be permitted to apply at Special Term to amend, the court granted

the application and ordered that the complaint be dismissed, unless the plaintiff within two weeks after the entry and service of the order paid the attorneys for defendant thirty dollars as a trial fee and moved at Special Term to amend the complaint. The terms of the order were complied with. The plaintiff annexed to her moving papers a proposed amended complaint, alleging damages to her said premises by water percolating through the soil from defendant's premises, caused by the negligence of the defendant in failing to keep a waste pipe attached to the water closet in the rear of his adjacent premises in proper repair and to repair a break therein, and by failing to keep a wash basin in the rear of his premises in proper repair and in negligently allowing a water pipe on his premises to freeze and burst. The complaint further alleges that the defendant during a period of four months failed and neglected to repair these defects "and abate the nuisance maintained upon his said premises, although repeatedly requested so to do by plaintiff," and that during this period water kept constantly flowing into plaintiff's cellar, weakening, decaying and rotting the foundation walls of plaintiff's cellar and depriving plaintiff's tenants of the use of the cellar, in consequence of which her tenants left and plaintiff "suffered great loss of rents," and that plaintiff's damages altogether amount to \$5,000. The plaintiff shows that the damages she sought to recover under the original complaint are the same as those claimed under the amended complaint, except as to the amount, and that when the action was brought to trial her attorney considered the complaint sufficient to authorize a recovery thereof. The defendant contends that the proposed amended complaint states an entirely new cause of action. We think not. She complains of the same damages to her property. It is clear that a recovery under the original complaint would have barred any further recovery under the proposed amended complaint, and this is one of the well-recognized tests for determining whether a new cause of action is stated. (*Davis v. N. Y., L. E. & W. R. R. Co.*, 110 N. Y. 646, fully reported in 15 Civ. Proc. Rep. 62.) The amendments merely amplify and perfect her pleading by setting forth more fully the grounds upon which the defendant is liable and the items of damage. We think the amendment should have been granted in furtherance of justice. (*Rosenberg v. Third Ave. R. R. Co.*, 47

App. Div. 323; *affd.*, 168 N. Y. 681; *Ziegler v. Trenkman*, 31 App. Div. 305; *Purdy v. Manhattan R. Co.*, 11 Misc. Rep. 394.) A sufficient cause for the delay in moving to amend as to the amount of damages is not shown to justify a delay of the trial by a formal motion at Special Term for that relief (*Rhodes v. Lewin*, 33 App. Div. 369), but, since the plaintiff was obliged to amend in other respects to prevent the dismissal of her complaint, the amendment as to the amount of damages has not delayed the trial.

We are, therefore, of opinion that the order should be reversed and motion granted upon payment of ten dollars costs of the motion and all taxable costs of the action to date, except the trial fee, less ten dollars costs and disbursements of the appeal which are awarded to plaintiff, the case to take its place upon the trial calendar according to the old date of issue.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Order reversed and motion granted on payment of ten dollars costs of motion and all taxable costs of action to date, except the trial fee, less ten dollars costs and disbursements of the appeal, which are awarded to plaintiff, the case to take its place on the trial calendar according to the old date of issue.

MILTON L. BOUDEN, Appellant, v. LONG ACRE SQUARE BUILDING COMPANY, Defendant, Impleaded with LEANDER S. SIRE, Respondent.

HENRY B. SIRE, Respondent.

Right of a creditor of a defendant in a mortgage foreclosure action to intervene — what must be shown where the application rests on an oral agreement inconsistent with written documents.

A creditor of a defendant in an action to foreclose a mortgage on real property is not, by virtue of such relation, entitled to intervene in the action.

A person seeking to intervene in an action, and to interpose a defense based upon an alleged oral agreement, absolutely inconsistent with the written documents relating to the matter, should present a strong case to remove the suspicion of bad faith and give reasonable grounds for believing that he has a meritorious defense.

APPEAL by the plaintiff, Milton L. Bouden, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of January, 1904, granting a joint motion on behalf of Henry B. Sire and the defendant Leander S. Sire to amend the summons and complaint without prejudice to proceedings already had regarding the other defendants, by making said Henry B. Sire and one Edward R. Thomas parties defendant, and permitting said Henry B. Sire at his election to serve his answer on the defendant company and upon said Thomas, and extending the time of said Leander S. Sire to answer.

The action is brought to foreclose a mortgage executed by the defendant company to the plaintiff on or about the 5th day of May, 1903, to secure the payment of \$47,748.07 in one year from date. On the 15th day of October, 1902, a lease was executed by the trustees for Henry Astor to the plaintiff of premises situate at the northwest corner of Broadway and Forty-fifth street for the term of twenty-one years from the 1st day of November, 1902, with the privilege of two renewals. This lease was sold and assigned by the plaintiff to the defendant company on condition that the mortgage be given on this leasehold interest to secure part of the purchase price of the assignment of the lease, and the assignment and mortgage so recited. The mortgage contains a condition that the mortgagor should promptly pay the ground rent reserved in the lease, and upon default in such payment the mortgagee might elect that the entire principal should become due and payable. The mortgagor defaulted in paying the rent due on the 1st day of August, 1903. The plaintiff paid this rent and then brought the action to foreclose the mortgage for the entire amount. The plaintiff claims that Leander S. Sire was made a party defendant for the reason that he was in possession of the premises by virtue of some arrangement with the mortgagor. He was absent from the State and is now in New Orleans. Personal service was made upon him in Chicago, pursuant to an order for service by publication, on the 3d day of October, 1903. He has appeared by attorney, and obtained an extension of time to answer for twenty days from the 4th day of December, 1903, upon an affidavit that within that time he would return to this State. So far as the defendant Leander S. Sire is

concerned, the only reason assigned for the extension of time is that it is deemed advisable that he should not answer until Henry B.'s motion to be made a party defendant is determined, as there are "highly important revelations forthcoming in the answer, which it is proposed to serve," and it is preferred that it be served on behalf of Henry. Henry B. and Leander S. Sire are brothers.

The affidavit of Henry B. Sire shows, not of his own personal knowledge, but on information derived from conversations with Leander embracing communications between Leander and Thomas, that Leander and Thomas organized the defendant company to conduct a theatre upon said premises on which they held leases in severalty; that they, by mutual agreement, surrendered their leases and procured the issue of a new lease for twenty years to the plaintiff, who held it for their benefit, and by their direction transferred it to the company and took back the mortgage, to foreclose which this action is brought; that Thomas also purchased an adjoining lot to enable them to extend the theatre; that the mortgage was intended as temporary security to secure the amount of Thomas' contribution toward the enterprise; that it was agreed that they should eventually have the same security in the leasehold, and to that end Thomas was to surrender the mortgage before it became due and accept sixty per cent of a bond issue of the company, which was to equal the amount invested by both, and that twenty-five per cent of the stock was to be issued to Thomas, and that the balance of the bonds and stock was to be issued to Leander; that labor strikes and financial stringency thwarted their building operations and Thomas has resorted to this foreclosure to get back his money; that the greater part of the money invested by Leander was Henry's; that he wishes to have Thomas joined as a defendant with a view to compelling a specific performance of the agreement to surrender the mortgage and to issue the bonds and stock of the company; that Leander gave Thomas the majority of the directorate of the company for the first year, and that Thomas controls a majority of the directors, but that upon the issue of the bonds and stock it was understood that Leander should thereafter control the company; that Leander is in New Orleans "and his return to this city is uncertain;" that he, Henry, applies to be admitted as a party defendant "because of the investment in the property being so

largely my own, and because I now hold an assignment of the said Leander S. Sire's rights and claims that are to be litigated in the present controversy;" that he has not been able to secure the affidavit of Leander as to these facts, "but I do not see as it matters, since it will not be probably denied that I have, by virtue of an assignment of his rights, the standing of a stockholder" in the company. It does not expressly appear that Thomas knew that Leander represented Henry, but Henry further states in his affidavit, apparently on personal knowledge, that he had an interview with Thomas concerning the payment of the ground rent due on August first, and it was agreed that they should provide funds in the name of the company to pay them, "so that I left it in the hands of Mr. Thomas and promised to pay over to him the proportion which would fall to the Sire interest to take care of, the company having no funds in its treasury. Mr. Thomas promised me personally to take care of the matter on behalf of the company, and, my brother Leander being away at the time, I rested on Mr. Thomas' assurances and was entirely ready to take care and pay the Sire portion." The attorney who appeared for Leander makes the motion in behalf of Henry, and makes affidavit that he believes that one or the other of them has a good defense to the complaint in whole or in part.

It appears that no stock of the company has been issued, except sufficient to qualify three directors, and that neither Henry nor Leander is a director. The plaintiff's affidavit shows that he purchased these outstanding leases on his own account, and that in surrendering them and procuring the other lease, selling and assigning the same to the company and taking the mortgage back for the purchase money, he was acting for himself, and that neither Henry nor Leander Sire nor Thomas had any interest therein; that, pending the action, rent for another quarter has become due, and he has been obliged to pay the same, and that any further delay will greatly prejudice his rights on account of necessitating the advancement of money as it falls due, and now that it appears that Leander Sire is not in possession he contemplates making a motion to discontinue as to him. The affidavit of the treasurer of the company corroborates that of the plaintiff as to the transactions between him and the company, and shows that the company contemplated raising money by a sale of its bonds, and contemplated contracting with

Leander Sire for the construction of a theatre and office building on the premises, but that it was unable to make the necessary financial arrangements or to procure a satisfactory contract, and having no money to pay rent, upon a meeting of the directors subsequent to notice to all the stockholders and officers of the commencement of this action, it was decided that the company had no defense. It appears that Thomas is in Europe, and that it is not expected that he will return for some time.

Emery H. Sykes, for the appellant.

William Stone, Jr., for the respondents.

LAUGHLIN, J. :

It is manifest that as a creditor of his brother Leander, Henry Sire is not entitled to intervene in this action. Nor is he entitled to intervene by reason of the promise of Thomas concerning the payment of the ground rent. It does not appear that Thomas knew that Henry, to whom he made the promise, had any personal interest in the matter. Thomas had a right to assume that Henry was acting for his brother Leander. No satisfactory excuse is offered for his not obtaining the affidavit of Leander. It appears that he knows where Leander is, and we may take judicial notice that within a few days an affidavit could be forwarded from New Orleans. Henry shows no personal knowledge of any of the material facts. Even if it be assumed, therefore, that he has succeeded by assignment to the rights and interests of Leander in the premises, he has not shown by competent proof that he has a meritorious defense to the action if he were admitted as a party. Moreover, he does not satisfactorily show an assignment of the rights and interests of his brother. It is only stated in an argumentative way, and only relates to the "rights and claims that are to be litigated in the present controversy." The affidavit appears to be evasive, and it is doubtful whether the application was made in good faith. It may be that business men would allow their rights to rest in parol and execute written documents absolutely inconsistent with the existence of the parol agreements, but that is not the ordinary course, and the applicant who desires to intervene in an action to interpose such a defense should present a strong case to remove the suspicion of bad faith and give reason-

able ground for believing that he has a meritorious defense. The court would also have been justified in denying the application to extend Leander's time to answer, but that not having been done, we think Leander should be given leave to serve his answer within two days after service of the order to be entered on this appeal.

It follows that the order should be reversed, with ten dollars costs and disbursements, and motion denied in so far as it relates to the application of Henry B. Sire to intervene and to have Thomas joined as a defendant, with ten dollars costs, and should be modified as already indicated so far as it relates to Leander's application for an extension of time, and as modified affirmed, without costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied in so far as it relates to application of Henry B. Sire to intervene and to have Thomas joined as a defendant, with ten dollars costs, and modified as indicated in opinion so far as it relates to Leander Sire's application for extension of time, and as modified affirmed, without costs.

AUGUST SCHIECK, Respondent, v. ANNIE DONOHUE, Appellant,
Impleaded with J. WILSON BRYANT and Others.

Mortgage foreclosure — election because of non-payment of interest that the principal sum be due — when, notwithstanding default in payment of interest, the mortgagee may not elect that the principal be adjudged to be due — proof, received without objection, of facts not alleged as a defense — appeal determined on the theory on which the case was tried.

The complaint in an action brought to foreclose a mortgage on real property alleged that the semi-annual interest due on April 6 and October 6, 1901, was not paid, and that after the lapse of thirty days the mortgagee, pursuant to the terms of the mortgage, elected that the entire principal should become due and payable.

Upon the trial it appeared that the defendant duly tendered the interest due October 6, 1900, but that the mortgagee refused to receive it, claiming that the mortgage was fraudulent and void. Shortly thereafter the mortgagee brought an action to have the mortgage in suit declared null and void on the ground of

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fraud, and to have a previous mortgage given to secure the same indebtedness reinstated and foreclosed.

This action was discontinued, without costs to either party, by stipulation on October 15, 1901. The present action was begun November 18, 1901. Prior to the commencement of the present action the mortgagee made no demand for the payment of any of the installments of interest, and never gave the mortgagor notice of the withdrawal of his claim that the mortgage in suit was void or that he would accept the interest which had been previously tendered, or the subsequent installments of interest. Before the second installment of interest became due the mortgagee changed his residence and gave the mortgagor no notice thereof, and the latter was unable to ascertain it, although she made diligent inquiry.

During the pendency of the former action the mortgagor expressed to the mortgagee's attorney her willingness to pay the installments of interest due, but the attorney refused to accept the same unless the mortgagor would pay him a further sum of \$150 costs.

Held, that, under the circumstances, the mortgagee was not at liberty to elect that the entire principal should become due because of the mortgagor's default in the payment of the two installments of interest, until he had notified the mortgagor of his determination to treat the mortgage as valid or of his readiness to accept the interest at a designated place;

That the action, therefore, could not be maintained as one to foreclose the mortgage to secure payment of the principal, but that, as the installments of interest were due and unpaid, the action could be maintained to secure payment of such interest;

The mortgagor, in her answer, alleged that prior to the commencement of the action, she had tendered to the mortgagee the installments of interest which were alleged to be unpaid and that the mortgagee had declined to accept them. Upon the trial no objection was taken to the evidence introduced by the mortgagor for the purpose of excusing her failure to make the tender of the interest.

Held, that as the mortgagor might have been permitted to amend her answer, if objection had been taken to the admission of the evidence in question, she was entitled, upon an appeal taken by her from the judgment, to have the appeal determined upon the theory on which the action was tried.

INGRAHAM, J., dissented.

APPEAL by the defendant, Annie Donohue, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of June, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, decreeing a foreclosure and sale of the premises described in the complaint.

J. Wilson Bryant, for the appellant.

Peter Cook, for the respondent.

LAUGHLIN, J. :

The action is brought for the foreclosure of a mortgage executed by the appellant upon the premises described in the complaint. The mortgage was given on the 6th day of April, 1900, to secure the payment of \$2,000 on the 6th day of April, 1905, with six per cent interest, payable semi-annually. It contained the usual condition that upon default in the payment of interest for thirty days the principal should become due and payable at the option of the mortgagee. The plaintiff alleges that the semi-annual interest due on the 6th day of April and the 6th day of October, 1901, was not paid and that after the lapse of thirty days the mortgagee elected that the entire principal should become due and payable. The appellant in her answer denied that the interest had not been paid or that the principal had become due and payable, and alleged as a defense that before the commencement of the action she tendered to the plaintiff "the full amount of the interest due him in cash personally, and the said plaintiff deliberately and willfully refused to accept the same from the defendant, and the defendant made the tender within the time prescribed for the payment of the interest and has ever since been ready and willing to pay the same to the plaintiff, but he has steadfastly refused to receive the same, although the defendant has repeatedly requested him to accept the same."

On a former appeal it was held that the facts set up in this answer would constitute a good defense. (*Schieck v. Donohue*, 77 App. Div. 321.)

Upon the trial the plaintiff showed the non-payment of the installments of interest which fell due in April and October respectively, in the year 1901 as alleged, but he admitted that the appellant duly tendered the first installment of interest due upon the mortgage on the 6th day of October in the year 1900, and that at that time he repudiated the mortgage and insisted that it was fraudulent and void. The attorney for appellant then wrote plaintiff saying that the money thus tendered had been deposited with him and would be kept subject to plaintiff's order. It was shown that the plaintiff shortly thereafter instituted an action for the cancellation of the satisfaction of a previous mortgage given to secure the same indebtedness and to have the mortgage upon which this action is based declared null and void on the ground of fraud, and

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to compel the appellant to deliver over to him the former mortgage and for the foreclosure thereof; that the former action was at issue and upon the calendar for trial, but was discontinued without costs to either party by a stipulation of the attorneys on the 15th day of October, 1901. This action was commenced on the eighteenth day of November thereafter. Prior to the commencement of this action the plaintiff made no demand for the payment of any of the installments of interest and never gave the appellant notice of the withdrawal of his claim that the mortgage was void, or that he would accept the interest which had been previously tendered or the subsequent installments of interest thereon. The evidence shows that during all this time both he and his counsel maintained that the mortgage was void, and plaintiff testified that he did not recognize the validity of this mortgage until he commenced this action to foreclose it; that before the second installment of interest became due, plaintiff changed his residence and gave the appellant no notice of that and she, after diligent inquiry, was unable to ascertain his residence; that during the pendency of the former action she was at all times ready to pay the installments of interest due and manifested a willingness to pay the same to his attorney and to him, but her offer was refused unless she would pay him the further sum of \$150 costs to which she had been subjected in a former suit, which she declined. The appellant also showed that she was at all times ready and willing to pay the interest and had the money for the plaintiff. This evidence was all received without objection or exception that an excuse for the failure to pay the installments of interest was not pleaded. The attorney for plaintiff testified that he gave the appellant the address of the plaintiff, but this is fairly controverted by her evidence. In these circumstances the appellant is entitled to have her appeal determined upon the theory upon which the action was tried, for if her answer was insufficient and the objection had been taken it might have been amended. (*Knapp v. Simon*, 96 N. Y. 284; *Fox v. Powers*, 65 App. Div. 112; *Roberge v. Winne*, 144 N. Y. 709, 712; *Frear v. Sweet*, 118 id. 454; *Brady v. Nally*, 151 id. 253; *Moffatt v. Fulton*, 132 id. 507.)

We are of opinion that the plaintiff was not at liberty to elect that the entire principal should become due on account of a default in the payment of interest for which he himself was responsible.

His conduct is not commendable. It is manifest that in the first instance he denied the validity of the mortgage upon which he now sues for the purpose of enforcing the immediate payment of the indebtedness under a prior mortgage for which this was given as a substitute, and when he concluded that he could not succeed in that action, having repudiated this mortgage and having left plaintiff in ignorance of his residence, and led her to believe he would not take the interest without exacting further moneys to which he was not entitled, he attempts to take advantage of her failure to pay two installments of interest which became due pending his former action and assumes to elect in consequence thereof that the whole principal, which the appellant was to have until April, 1905, to pay, became due and payable in the fall of 1901. It must be borne in mind that this is not an action at law upon the bond where a strict legal tender would be required, but that the plaintiff has addressed his petition for relief to a court of equity which may not only refuse to enforce a forfeiture, but may, in a proper case, relieve against it; and that in equity the failure to make a tender before trial ordinarily only affects the question of costs, and an offer in the pleading of readiness and ability to perform, such as is contained in the appellant's answer, without a tender or keeping the tender good, is sufficient as a defense, no affirmative relief being asked by defendant. (*Lawson v. Barron*, 18 Hun, 414; *Freeson v. Bissell*, 63 N. Y. 168; 3 Pom. Eq. Juris. § 1407 and note; *Stevenson v. Maxwell*, 2 N. Y. 408, 415; *Nelson v. Loder*, 55 Hun, 173; *affd.*, 132 N. Y. 288; *Halpin v. Phenix Ins. Co.*, 118 id. 165, 178; *Werner v. Tuch*, 127 id. 217; *Lewis v. Wilson*, 43 N. Y. St. Repr. 34; *Powell v. Linde Co.*, 49 App. Div. 286, and cases cited; *McNally v. Fitzsimons*, 70 id. 179.) In equity forfeitures will not be enforced where the debtor was ready, willing and able to pay and made every reasonable effort to find the creditor to make a tender or where the tender was prevented or excused by any act of the creditor and the debtor avers a willingness and ability to pay. (Pom. Eq. Juris. *supra*; 21 Ency. Pl. & Pr. 551, 559, 575; Wilt. Mort. Forec. 47; *Hale v. Patton*, 60 N. Y. 233; *Bennett v. Stevenson*, 53 id. 508; *Wilcox v. Allen*, 36 Mich. 160, 169; *Zlotocizski v. Smith*, 117 id. 202.) In *Selleck v. Tallman* (87 N. Y. 106), where the vendor demanded interest to

which he was not entitled, it was held that this excused a tender of the principal until the vendor notified the vendee of his readiness to accept the principal without interest. A refusal to accept dispenses with the necessity of a tender. (*Crary v. Smith*, 2 N. Y. 60, 65.) In *Noyes v. Clark* (7 Paige, 179), which was an action by a second assignee of a mortgage to foreclose it, where neither assignment had been recorded and the mortgagor had tendered the installment of interest due to the mortgagee who refused to accept the same on account of the assignment, the court declared that there could be no valid election to declare the principal due, and that, if the holder of the mortgage intended to take advantage of the neglect of the mortgagor to pay the interest, "It was his duty, as an honest man, to have given notice * * * of the assignment and of his residence or the place where the payment could be made." In *House v. Eisenlord* (30 Hun, 90; affd., 102 N. Y. 713), where the sum of eighty-seven dollars and fifty cents was due for interest upon a mortgage and the mortgagee accepted seventy dollars and informed the mortgagor that he might pay the balance at any time, and then after waiting thirty days brought an action of foreclosure, and elected that the entire principal should become due, it was held that the agreement for an extension of time to pay the interest due was without consideration and, therefore, the foreclosure could be maintained therefor, but that the mortgagee, *having made no demand for the payment of the balance of interest*, would not be permitted in the circumstances to elect that the principal should become due, and a foreclosure was permitted only for the balance of the interest and without costs. The case most favorable to the plaintiff is *Asendorf v. Meyer* (8 Daly, 278, 280), where the rule was stated to be that where sufficient excuse for the default in paying interest to relieve from the election to regard the principal as due is shown, still the mortgagee may foreclose for the interest due and recover costs unless the defendant has paid the interest into court. In the circumstances we are of the opinion that, before the plaintiff could elect to declare the principal due on account of appellant's default in paying the interest, he should have notified her of his determination to treat the mortgage as valid or of his readiness to accept the interest, informing her where the same might be paid. The interest, however, is due and has not been paid, and the plaintiff is enti-

tled to maintain his action to foreclose the mortgage for the non-payment of the interest.

It follows that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., McLAUGHLIN and HATCH, JJ., concurred.

INGRAHAM, J. (dissenting):

I dissent. The question here is whether or not the answer set up a defense to the cause of action alleged in the complaint which was established by the evidence upon the trial. The mortgage to foreclose which the action was brought is conceded. By its provisions the principal sum becomes due on the failure of the mortgagor to pay an installment of interest for thirty days, and the only defense alleged is "that before the commencement of this action the defendant Annie Donohue duly tendered to the plaintiff the full amount of the interest due him in cash personally, and the said plaintiff deliberately and willfully refused to accept the same from the defendant, and the defendant made the tender within the time prescribed for the payment of the interest and has ever since been ready and willing to pay the same to the plaintiff." No application is made to be relieved from a default, if one occurred, and the simple question before the trial court was whether or not this allegation of the answer was sustained by the evidence. The complaint alleges that "the interest upon said bond and mortgage which became due and payable on the 6th days of April and 'October, one thousand nine hundred and one, has never been paid; that more than thirty days have elapsed since the same became due and payable; that the plaintiff has elected and now elects to deem the whole principal sum to be immediately due and payable." The plaintiff testified that the interest that was payable on the 6th day of April, 1901, was not paid; that the interest that was payable October 6, 1901, was not paid and remained unpaid down to the trial. The plaintiff admitted that the interest that became due on October 6, 1900, was tendered to him and that he refused to accept it, he having at that time an action pending to set aside this mortgage as having been obtained by fraud and to restore a former mortgage that had existed upon the property and which had been satisfied upon the execution of the mortgage in suit. There was, however, no proof

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to show that the interest that became due in April, 1901, and October, 1901, had ever been tendered. The former action was discontinued by an order entered upon a consent of all the parties to the action, this defendant being one of the defendants, and her attorney consenting on October 5, 1901, the day before the installment of interest due October 6, 1901, was payable. That action having been discontinued, all claim that the present mortgage was not to be enforced was at an end; the defendant had thirty days within which to pay the interest that was then due. She made no effort to pay the interest; no tender of it was made and that default extended until after the commencement of this action, which was on November 18, 1901, and after the default had extended thirty days, so that, assuming that the defendant's position excused the tender of that interest up to the date of the discontinuance of the first action, after that action was discontinued, the defendant was certainly bound to pay or tender the interest that became due on a subsequent day, and a default continuing for upwards of thirty days gave the plaintiff the right to elect that the whole amount secured by the mortgage should become due. There is no claim that she made any effort to tender this amount. If she did not know the residence of the plaintiff, she knew that he was represented in the action by an attorney, and she certainly could have tendered the interest to him.

I think the defense alleged was unproven and that upon the conceded facts the plaintiff was entitled to judgment.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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FENWICK B. SMALL, as Trustee in Bankruptcy of the Property and Effects of WILLIAM M. DEAN & COMPANY, Bankrupt, Plaintiff, v. LUKE A. BURKE, Appellant, Impleaded with GEORGE PEABODY WETMORE, Respondent, and Others, Defendants.

Contract to complete a building within a specified time "under a penalty of twenty-five dollars per day" — when it is a penalty and when liquidated damages — the owner should show the rental value — allowance for time spent in making alterations and in complying with sanitary and building laws.

Where a building contract provides for the completion of the work "on or before the expiration of seventy-two working days * * * under a penalty of twenty-five dollars per day for every day thereafter," the presumption is that the amount was intended to represent a penalty or security for the actual damages and not liquidated damages.

If the loss of the use or rental value of the premises approximates the amount specified in the contract, it is fair to assume that, although specified as a penalty, it was intended as liquidated damages.

The burden of showing that it was intended as liquidated damages rests upon the owner, and it is, therefore, incumbent upon him to show the rental value of the premises.

The following provision in such contract, "Should the owner at any time during the progress of the said buildings request any alterations, deviations, additions, or omission from the said contract he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract, as the same may be, by a fair and reasonable valuation," does not contemplate that, in determining the time which the contractor took to complete the work, he shall not receive any allowance for the time that he was delayed by changes, alterations or omissions ordered by the owner.

A provision in the contract requiring the contractor, at his own expense, to "comply with all sanitary laws, ordinances and rules, and all other orders of the Board of Health or other authorities affecting the cleanliness, safety, occupation and use of the said premises, and the sidewalk and the street in front of the same," does not impose upon the contractor the risk of delays arising from the fact that the plans and specifications violated the building laws and ordinances.

This provision of the contract must be limited to the work which the contractor undertakes to perform, and as between him and the owner he does not become an insurer of the sufficiency of the plans or assume any responsibility for delays caused by the interference of the authorities, owing to the fact that the plans and specifications had not been prepared in accordance with law or in conformity to the lawful requirements of the local authorities.

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APPEAL by the defendant, Luke A. Burke, from so much of a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 13th day of April, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, as holds that the mechanic's lien filed by the appellant against the property of the respondent is a good and valid lien only to the extent of \$226, and directs the foreclosure of the said lien for that amount.

William F. Kimber, for the appellant.

William Man, for the respondent.

LAUGHLIN, J. :

The action was brought to foreclose a mechanic's lien. The controversy on the appeal is between defendants. The appellant was the general contractor, and the respondent Wetmore is the owner of the premises. The appellant filed a lien which has been sustained to the extent of \$211.66 with interest. In arriving at this balance the court has deducted from the contract price of the work and the value of extra work the sum of \$363.20 for defective work, and the further sum of \$1,550 as a penalty for failure to complete the work within the stipulated time. The appellant contends that these deductions should not have been made, and these are the only questions presented by the appeal.

The contract was in writing and it was executed on the 13th day of August in the year 1900. The contractor agreed to erect, pursuant to drawings and specifications thereto annexed, three buildings to be known as Nos. 314, 316 and 318 West Forty-second street, "on or before the expiration of seventy-two working days * * * under a penalty of twenty-five dollars per day for every day thereafter." On the 19th of February, 1901, the owner through the architect at the suggestion of the appellant accepted the buildings without prejudice to his rights under the contract, the contractor agreeing on demand to do any further work requested "to meet the requirements of the specification and contract." The trial court found that between the expiration of the seventy-two working days allowed by the contract for the completion of the work and the nineteenth day of February when it was conditionally accepted,

there elapsed sixty-two additional working days ; that the delay of these sixty-two days was unexcused, and that the owner was entitled to the penalty prescribed in the contract therefor. The appellant contended upon the trial and gave evidence tending to show that the owner was responsible for a considerable part if not all of this delay ; and that for the most part it was caused by extra work and alterations ordered by the owner pursuant to a provision of the contract reserving to him that right. Counsel for the owner contended upon the appeal, and evidently claimed upon the trial, that the entire work, including any extra work that might be ordered under the contract, was required to be performed within the time specified, and that the penalty clause of the contract applied to any additional time required for completion. This claim is based on paragraph 3 of the contract which is as follows : " Should the owner at any time during the progress of the said buildings request any alterations, deviations, additions, or omission from the said contract he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract, as the same may be, by a fair and reasonable valuation." We are of opinion that the clause to the effect that omissions, alterations or additional work " shall in no way affect or make void the contract " does not require and should not receive the construction for which the respondent contends. Clearly the parties intended that changes and alterations should not annul the remaining part of the contract ; but it was not contemplated that the owner was to be at liberty to require a substitution of material or other change in the work which would necessarily delay the remaining work covered by the original contract, and that the contractor was to take the risk of such delay and be obligated, notwithstanding it, to perform the contract work within seventy-two working days. The rule in such case is that the contractor is to be allowed for the *time that the final completion of the contract work* is necessarily delayed by any changes, alterations or omissions ordered by the owner. This construction of the contract was not adopted on the trial.

In arriving at the number of days for which the contractor was liable for the penalty no deduction was made for delays for which the owner was responsible, and it appears by uncontradicted evi-

dence that the owner was responsible for a great number of days delay. The only deductions made were for Sundays, holidays and days upon which storms required the suspension of work.

During the progress of the work the owner determined to wire the building for electric light. According to the testimony of the contractor he was ready to proceed with the plastering on the seventeenth day of November but deferred doing so at the instance of the architect to enable the owner to determine whether he wished to wire the premises for electric light; that subsequently the owner determined in the affirmative and that this delayed the work of plastering for "three or four weeks" or from the 17th day of November until "after Christmas." This testimony is not expressly controverted. The architect concedes that wiring the building for electric light took eleven days but he does not say whether this delayed the plastering or how long. The architect, also during the progress of the work, determined to substitute iron girders for certain wooden posts specified in the contract at the agreed extra compensation of \$150. The contractor testified that this delayed the entire work ten days, and the architect concedes that it delayed it three days. The contractor was also directed to depart from the requirements of the contract with reference to the arrangement of the front steps descending into the area or basement. He says that this delayed the work three or four days but the architect admits that the delay was six days. There was certain rock excavation which the parties agreed was extra work. The contractor testified that this caused a delay of twelve days and the architect concedes a delay of three days. The contractor testified that the work was delayed three weeks on account of the failure of the owner to decide on the color of paint to be used on the buildings, and the architect concedes a delay of four days through this cause. The contractor testified that according to the original plans with reference to which the contract was made, the foundation wall at one side was not to be constructed as low as the bottom of the cellar, but that the building department required a further excavation and that the foundation wall be carried down to the level of the bottom of the cellar and that the wall upon adjacent premises be underpinned, and that this caused a delay of one month. The owner's architect testified concerning this that on September twentieth a

violation was filed by the building department which "it took nine days to get rid of."

The respondent claims that, by paragraph 12 of the contract, which provides that the contractor shall, at his own expense, "comply with all sanitary laws, ordinances and rules, and all other orders of the Board of Health or other authorities affecting the cleanliness, safety, occupation and use of the said premises, and the sidewalk and the street in front of the same," the appellant assumed the risk of delays arising from violations of the building laws and ordinances. We are of opinion that this provision of the contract must be limited to the work which the contractor undertook to perform, and that as between him and the owner he did not become an insurer of the sufficiency of the plans or assume any responsibility for delays caused by the interference of the authorities owing to the fact that the plans and specifications had not been prepared in accordance with law or in conformity to the lawful requirements of the local authorities. These delays all occurred before the conditional acceptance of the buildings by the owner, and many of them occurred during the first seventy-two working days after the contract was executed.

According to the undisputed evidence the contractor was entitled to have deducted a large part of, if not the entire sixty-two days, for which he has been charged with the penalty. We cannot, however, make findings of fact, and, therefore, a new trial must be granted.

It was evidently assumed on the trial that the twenty-five dollars for each day's delay in completing the work, designated in the contract as a "penalty," was intended as liquidated damages. There is no provision of the contract other than those quoted which sheds any light on this question. Equity does not enforce penalties. This was, undoubtedly, a proper case for the parties, by an appropriate liquidated damage clause, to stipulate the damages that should be paid upon a failure to complete the work within the time specified. (*Ward v. Hudson River Building Co.*, 125 N. Y. 230; *Curtis v. Van Bergh*, 161 id. 47.) Presumptively, however, where the parties unqualifiedly specify a forfeiture as a penalty it was their intention that the amount specified should be a penalty or security for the actual damages and not liquidated damages. (*Colwell v. Lawrence*,

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38 N. Y. 71; 3 Pars. Cont. [9th ed.] * 157-159; *Caesar v. Robinson*, 174 N. Y. 492.) The fact that the amount is specified as a penalty for each day's delay is some evidence, perhaps, that it was intended as damages. (*Taylor v. Sandiford*, 7 Wheat. 13.) If there had been no delay for which the owner was responsible the contractor should have completed these buildings early in December. It is to be inferred from the evidence that they were constructed for the purpose of renting. In these circumstances the damages would ordinarily be the loss of the use or rental value of the premises. We cannot take judicial notice as to what that rental value is, or that it would amount approximately to the sum specified as a penalty. If it approximated the amount of the penalty it would be fair to assume that, although specified as a penalty, it was intended as damages, but the burden of showing this was on the owner. (*Taylor v. Sandiford*, *supra*; *Richards v. Edick*, 17 Barb. 260, 266; *Laurea v. Bernauer*, 33 Hun, 307.) We think, therefore, the owner, if he expects to have the amount specified as a penalty treated as liquidated damages, should have shown the rental value of the premises and that this would have been competent evidence. The case in this regard is distinguishable from *Liotta v. Abruzzo* (82 App. Div. 429), where, although the amount was specified as a penalty, it was clear that it was intended as liquidated damages, and in that case but for such construction only nominal damages could have been recovered, whereas here substantial damages could be shown and recovered for the breach of the contract without any liquidated damage agreement. (*Caesar v. Robinson*, *supra*.)

It follows, therefore, that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

ABIGAIL V. DITMAS, Individually and as Sole Surviving Administratrix, etc., of HENRY C. DITMAS, Deceased, Respondent, v. JAMES McKANE and Others, Appellants, Impleaded with Others.

An action is not maintainable by an administrator on a note deposited with a trust company pursuant to section 2595 of the Code of Civil Procedure — a creditor's action cannot be based on a judgment so obtained — the fact that the administrator afterwards obtains title to the note in her individual capacity does not entitle her to maintain the creditor's suit.

Upon the death of Henry C. Ditmas, who held the promissory note of John Y. McKane for \$25,000, letters of administration on his estate were issued to Abigail V. Ditmas. She did not furnish a bond in an amount sufficient to entitle her to receive possession of the note, and the surrogate directed that the note should not pass to the administratrix but should be deposited with a trust company.

This action of the surrogate was taken pursuant to section 2595 of the Code of Civil Procedure, which provides that in a case where "the value of the estate or fund is so great that the surrogate deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of money belonging to the estate or fund be deposited with him, to be delivered to the county treasurer or be deposited subject to the order of the trustee, countersigned by the surrogate, with a trust company duly authorized by law to receive the same."

Thereafter the administratrix, without obtaining any further order or direction from the surrogate, brought an action against McKane on the note, recovered judgment against him for the amount thereof and issued an execution thereon, which was returned unsatisfied.

Subsequently, by a decree of the Surrogate's Court, the estate of the said Henry C. Ditmas was distributed and the note in question was delivered to his administratrix in her individual capacity. The administratrix then brought an action as administratrix and in her individual capacity to set aside alleged fraudulent conveyances executed by John Y. McKane.

Held, that the action could not be maintained, for the reason that the plaintiff had no authority to bring the action on the note without obtaining authority from the surrogate;

That a payment of the note to the plaintiff, while it was on deposit with the trust company, would not have discharged McKane's obligation thereon;

That the fact that the plaintiff, after obtaining judgment on the note, acquired title to the note in her individual capacity, did not entitle her to maintain the judgment creditor's action;

That, before such an action may be maintained, all the statutory requirements and conditions precedent must be complied with.

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APPEAL by the defendants, James McKane and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 6th day of September, 1901, upon the decision of the court, rendered after a trial at the Kings County Special Term, setting aside as fraudulent certain deeds, and also from an order entered in said clerk's office on the 6th day of September, 1901, amending the summons and amended complaint herein, with notice of an intention on the part of the defendant Fanny McKane to bring up for review upon such appeal the above-mentioned order amending the summons and amended complaint and also two orders entered in said clerk's office on the 2d day of October, 1901, denying said defendant's motion to postpone the trial of the action. Also a separate appeal by the defendant Fanny McKane from the two last-mentioned orders denying said defendant's motion to postpone the trial.

The appeal in this action was transferred from the second department of the Appellate Division to the first department.

William E. C. Mayer, for the appellant James McKane.

George W. Roderick, for the appellants Fanny McKane and others.

Marcus B. Campbell, for the appellant Ira McKane individually and as executor of Fanny McKane, deceased.

Somerville & Sheehan, for the appellant Theodore McKane.

Joseph A. Burr, for the respondent.

O'BRIEN, J. :

This is an appeal from a judgment in plaintiff's favor setting aside certain deeds of property belonging to John Y. McKane, now deceased, as fraudulent. Prior to the bringing of this action John Y. McKane, who was then living, had the title in fee to many distinct parcels of real estate which are particularly described in the complaint, some of which were transferred to his brother, James McKane, and some to George W. Roderick. The parcels thus separately deeded had, at the time of the commencement of this action, by mesne conveyances, in the making of which the appellants were concerned, come into the possession of Fanny McKane, wife of John Y. McKane.

When the original transfers were made John Y. McKane was indebted to Henry C. Ditmas, deceased, in the sum of \$25,000, which was represented by a promissory note for that amount. The plaintiff herein, Abigail Ditmas, having together with Johanna Ditmas, applied for letters of administration of the estate of Henry C. Ditmas, deceased, and not having furnished a bond in an amount sufficient to entitle her to receive and obtain possession and control of the entire assets, the surrogate, pursuant to the provisions of the Code of Civil Procedure to which we shall advert, issued letters of administration to them, but directed that the possession and custody of the note in question should not pass to the administratrix, but that the note should be deposited with a trust company. Without thereafter obtaining any order or direction from the surrogate, and while the note was thus in the custody and possession of the trust company, the plaintiff, as surviving administratrix (Johanna Ditmas having died) brought an action against John Y. McKane, who was then in prison, and subsequently entered a judgment against him for the full amount of the note and interest. Thereupon the plaintiff issued execution, and it having been returned unsatisfied, she has now brought this action for the purpose of setting aside the conveyances made in favor of the several defendants, which, it is alleged, were made in fraud of her rights as a creditor.

It will be noticed that this is a judgment creditor's action, the basis of which is necessarily the obtaining of a valid judgment against the debtor and the return of an execution against his property unsatisfied. If, therefore, the plaintiff had no right to sue upon the note and obtain a judgment, or, having the right to obtain a judgment, had no right to issue an execution to collect it against the property of the debtor, then it would follow that she had no right to institute this judgment creditor's action.

Section 2595 of the Code of Civil Procedure provides that in a case where "the value of the estate or fund is so great that the surrogate deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of money belonging to the estate or fund be deposited with him, to be delivered to the county treasurer or be deposited subject to the order of the trustee, countersigned by the surrogate, with a trust company duly authorized by law to receive the same. After such

a deposit has been made the surrogate may fix the amount of the bond with respect to the value of the remainder only of the estate or fund. A security thus deposited shall not be withdrawn from the custody of the county treasurer or trust company, and no persons other than the county treasurer or the proper officer of the trust company shall receive or collect any of the principal or interest secured thereby, without the special order of the surrogate entered in the appropriate book. Such an order can be made, in favor of the trustee appointed, only where an additional bond has been given by him, or upon proof that the estate or fund has been so reduced by payments or otherwise, that the penalty of the bond originally given will be sufficient in amount to satisfy the provisions of law relating to the penalty thereof, if the security so withdrawn is also reckoned in the estate or fund."

Pursuant to this provision, the note was deposited with a trust company which was alone entitled to "receive or collect" any of the property or interest secured thereby; and we have been unable to find any warrant for the step taken by the plaintiff, while it thus remained in the custody of such trust company, in suing upon a note which was not in her possession and to which she had not obtained the title.

It may be suggested that in analogy to limited letters of administration, which are issued to collect death claims based upon negligence, a distinction is to be observed between the right to sue and the right to collect. By reference, however, to the statute under which such limited letters are issued (Code Civ. Proc. § 2664) it will be noticed that while the right to collect is withheld, the right to sue is expressly given. Under section 2595 of the Code, no such right to sue is given; and although the surrogate might, by subsequent order, have conferred such right, which we do not decide, because unnecessary, it is not contended that any such order in the present instance was granted. Even if there were a doubt upon this subject, which we do not entertain, holding as we do that the plaintiff could not without the permission of the surrogate sue upon the note while it remained in the custody of the trust company, there cannot be the slightest doubt upon the further proposition that the plaintiff had no right to issue an execution upon the judgment, because that is expressly forbidden by the section.

Although the letters of administration granted to the plaintiff were general in form, they were necessarily limited by section 2595 of the Code which deprived the plaintiff of the custody and control of the note and, to that extent, therefore, they were, by the very language of the section, limited so as to exclude from the administration of the plaintiff the particular security which had thus been impounded and which as directed was deposited with the trust company. By the grant of letters of administration, therefore, no right or authority was conferred upon the plaintiff to sue upon this particular note, because, by order of the surrogate, it had been deposited with the trust company; and we fail to see by what right the plaintiff could proceed to do so without first obtaining the consent of the surrogate. That the statutory requirements must be complied with and that the conditions precedent must appear before a judgment creditor's action can be maintained, has been so frequently decided that the citation of authority would seem to be unnecessary; but as illustrative of the principle involved two cases among others to which we may refer are *Prentiss v. Bowden* (145 N. Y. 342) and *Dittmar v. Gould* (60 App. Div. 94).

We do not think, moreover, that a payment to the plaintiff, if made after the deposit of the note with the trust company, would have discharged the obligation of John Y. McKane upon it, particularly without his having obtained repossession of the note. This, however, the plaintiff could not give him and as long as she had no power or authority to get the note for the purpose of surrendering it, she was not in a position to ask, demand or receive payment. As she could not, therefore, legally receive payment from the debtor and discharge him, it is difficult to see upon what theory she could sue for and obtain a judgment against him and thereafter issue execution to collect it.

It is suggested that even though we reach the conclusion that the plaintiff as administratrix had no right to obtain the judgment and issue the execution, still, for the purpose of maintaining this judgment creditor's action, there is another view upon which it can be supported, namely, that she subsequently obtained, as an individual, all right, title and interest in and to the note. In this connection our attention is called to the fact that upon the trial (and against the opposition of the defendants) an amendment was allowed

to include Abigail Ditmas individually as a plaintiff, she having originally brought this action as administratrix. It appears that after the judgment was obtained upon the note and the execution returned unsatisfied and the estate of Henry C. Ditmas was collected and ready for distribution, a decree of the surrogate was entered in the matter of that estate which directed distribution of the assets and discharged the administratrix and which turned over the note in question to her as her individual property.

The obvious answer is that all these things occurred after the obtaining of the judgment and the issuing of the execution upon which this judgment creditor's action is based; and it would be a curious process of reasoning which would render a judgment in favor of the plaintiff as administratrix, which was invalid when obtained and upon which she had no right to issue execution, perfectly valid and effectual for the purpose of supporting the execution upon the ground that she had at a much later date got possession of and title to the note as an individual. We do not think that the plaintiff, because of the subsequent delivery of the note to her as an individual, could obtain any rights in a judgment which as administratrix she had improperly obtained.

We do not deem it necessary to discuss the merits as to the validity of the transfers made by John Y. McKane in his lifetime, nor the numerous other questions which have been presented by the appellants, thinking as we do that the objection which we have been considering and which lies at the very foundation of the plaintiff's right to maintain this judgment creditor's action is fatal to such right.

The appeal of the defendant Fanny McKane from the two orders denying motions to postpone trial must be dismissed. The order amending summons and amended complaint must be affirmed. The proceeding to bring up for review upon the appeals from the judgment the order amending the summons and amended complaint, and the two orders denying motions to postpone trial must be dismissed.

The judgment must be reversed and a new trial ordered, with one bill of costs to appellants to abide the event.

VAN BRUNT, P. J., PATTERSON, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Appeal of defendant Fanny McKane from the two orders denying motions to postpone trial dismissed. Order amending summons and amended complaint affirmed. The proceeding to bring up for review upon the appeals from the judgment the order amending summons and amended complaint, and the two orders denying motions to postpone trial dismissed. Judgment reversed and new trial ordered, with one bill of costs to appellants to abide event.

ISIDOR STRAUS and NATHAN STRAUS, Composing the Firm of R. H. MACY & COMPANY, Appellants, v. AMERICAN PUBLISHERS' ASSOCIATION and Others, Respondents.

An unlawful combination enjoined from spying upon another person's business.

Members of a combination, who, after such combination has been declared unlawful by the Court of Appeals, for the purpose of carrying out the objects of such illegal combination, spy upon another person's business, thereby seriously injuring it, will be enjoined from persisting in such espionage.

VAN BRUNT, P. J., dissented.

APPEAL by the plaintiffs, Isidor Straus and another, composing the firm of R. H. Macy & Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of January 1903, denying the plaintiffs' motion for a temporary injunction.

John G. Carlisle and *Edmund E. Wise*, for the appellants.

Stephen H. Olin, for the respondents American Publishers' Association and others.

Thaddeus D. Kenneson, for the respondents Walcott and others.

INGRAHAM, J.:

This appeal, which was submitted in the April term of 1903, was held pending the decision of the Court of Appeals on an appeal from an order of this court reversing an interlocutory judgment sustaining a demurrer to the complaint. Upon that appeal the Court of Appeals has held that the complaint states facts sufficient to constitute a cause of action (*Straus v. American Publishers'*

Assn., 177 N. Y. 473), and the question whether, under the circumstances, there should be a temporary injunction before final judgment is now presented. The demurrer was overruled upon the ground that the agreement under which the defendants are acting is a combination in violation of section 1 of chapter 690 of the Laws of 1899.

In answer to an allegation in the affidavit upon which the motion is made, that the American Publishers' Association, through its manager, established a system of espionage upon the manager of the book department of the plaintiffs' business and caused her to be followed and shadowed by detectives, both at her home and at the plaintiffs' place of business, and that employees of the plaintiffs were bribed to give information concerning the sources of plaintiffs' supply, the president of the association stated, without denying this allegation, that "any steps taken by the Publishers' Association to watch transactions in the plaintiffs' store have been wholly for the purpose of detecting these false and fraudulent purchases on behalf of the plaintiffs and their agents and to enable the different members of the Publishers' Association to enforce the contract, made by them with the purchasers of copyright books, that such copyright books shall be sold to the public only at the net prices affixed to them;" and the manager of the Publishers' Association, while not denying this allegation of the manager of the plaintiffs' book department, states: "As none of the members of the Association sell their copyrighted books to the plaintiffs, it is certain when the plaintiffs advertised such books for sale that they have obtained them either by false representations or by a breach of contract with some of the persons who have bought them from the publishers. In either case the publishers have the right to ascertain how the plaintiffs have obtained the books." The defendant, the American Publishers' Association, is a corporation organized under the laws of this State. It has entered into a combination to prevent the plaintiffs from purchasing books with which they can carry on their business except upon such terms as is imposed by the corporation. To carry out this object it has established a system of espionage upon the plaintiffs' business, causing the plaintiffs' manager to be followed by detectives and publishing to the world that any book dealer who sells any books to the plaintiffs will not be allowed to purchase any books from any member of

the Publishers' Association or from any dealer to whom the members of the Publishers' Association have supplied books; and the combination having been declared to be a violation of law, and it appearing that those acting in pursuance of this combination have caused serious injury to the plaintiffs, it would seem to follow that the defendants should be prohibited from carrying out the illegal combination.

We accept the statement of the defendants that they believed the combination which they adopted was legal and did not violate the statute and that they acted under the advice of counsel and in entire good faith; but the highest court of the State having declared the agreement to be an illegal combination, further proceeding under it should be restrained.

It follows that the order appealed from should be reversed, with ten dollars costs and disbursements, and the temporary injunction granted.

PATTERSON, McLAUGHLIN and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

Order reversed, with ten dollars costs and disbursements, and motion granted.

CLIFFORD L. MILLER, Respondent, v. ORLANDO W. NORCROSS, Doing Business under the Name of NORCROSS BROTHERS, and THE SOCIETY OF THE LYING-IN HOSPITAL OF THE CITY OF NEW YORK, Appellants, Impleaded with Others.

Building contract—when a sub-contractor is not entitled to an extension of time because of “the abandonment of the work by the employees through no default of his”—failure to present a written application therefor—unjustifiable interference by him with work done by the contractor inducing a strike.

The principal contractor for the construction of a building entered into a sub-contract for the performance of a portion of the work, which provided that the sub-contractor should prosecute the work as rapidly as permitted by the progress of the building, and should complete it in season not to delay the finishing of the buildings, “provided he is not obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the said first party, or of any other contractor employed upon the work, or by any damage which may happen by the action of the elements, or by the abandonment of

the work by the employees through no default of his, in which event an extension of time equivalent to such delay shall be granted upon application to the said first party (the principal contractor) in writing within twenty-four hours of the occurrence of such delay;" that "in case of any failure or unreasonable delay of the said second party (the sub-contractor) whether by act or default in the performance of any of the above stipulations or compliance with the true intent of these presents, not authorized in writing by the said party of the first part, it shall be lawful for the said party of the first part, after three days' notice in writing to said party of the second part, to provide other workmen and materials to complete the said work in the place of the said party of the second part, and to deduct the cost and charges thereby occasioned from the sums otherwise becoming due to the said party of the second part under this agreement without prejudice to any other remedy which the said party of the first part may have for breach thereof."

During the progress of the work cracks appeared in the plastering work done by the sub-contractor, and the principal contractor directed him to remedy them. The sub-contractor refused to do so on the ground that the cracks were caused by the defective work of other parties. The sub-contractor having persisted in his refusal to remedy the defect, the principal contractor, after repeatedly demanding that the sub-contractor complete his work, which he admitted that he was bound to do, and after notifying the sub-contractor of his intention to do so, employed plasterers to remedy the defects.

Thereafter the sub-contractor criticized a delegate of the plasterers' union for furnishing the principal contractor with men to fill up the cracks. As a result of this, the plasterers in the employ of the sub-contractor struck. The sub-contractor did not make a written application for an extension of time on account of the delay, and thereafter made no attempt to complete his work, although the principal contractor again called his attention to his failure to do so, and notified him that, in view of his continued default, the work would be completed by the principal contractor.

Held, that the sub-contractor had not brought the case within the protection of the provisions of the contract relating to "the abandonment of the work by the employees through no default of his, in which event an extension of time equivalent to such delay shall be granted upon application to said first party in writing within twenty-four hours of the occurrence of such delay,"

First, because no written application was presented to the principal contractor within twenty-four hours of the happening of the delay.

Second, because the cause of the strike was the unjustifiable interference by the sub-contractor in the work being done by the plasterers under the direction of the principal contractor, and the strike could not, therefore, be claimed by the sub-contractor to have arisen "through no default of his."

APPEAL by the defendants, Orlando W. Norcross, doing business under the name of Norcross Brothers, and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the

office of the clerk of the county of New York on the 8th day of June, 1903, upon the decision of the court rendered after a trial at the New York Special Term, with notice of an intention on the part of the defendant Norcross to bring up for review upon such appeal an order entered in said clerk's office on the 28th day of May, 1903, allowing the plaintiff to amend the prayer of his complaint so as to include a prayer for personal judgment against the said appellants.

P. J. Carlon, for the appellant Norcross.

Frank L. Crawford, for the appellant society.

Jacob F. Miller, for the respondent.

INGRAHAM, J. :

This action was brought to foreclose a mechanic's lien filed on behalf of the plaintiff, who had furnished to Mertz & Gibb certain material used in the construction of a hospital in the city of New York the property of the defendant corporation.

The complaint alleges that the defendant corporation, the owner of certain property described, made a contract with the defendant Norcross to erect a hospital upon the property; that Norcross made a contract with Mertz & Gibb whereby Mertz and Gibb agreed to do the mason work and plastering in said building and to furnish the labor and materials therefor, a copy of which contract is annexed to the complaint; that Mertz & Gibb entered into the performance of that contract and proceeded with the same until the 10th day of April, 1901, when their workmen employed struck and refused to work upon the job, through no fault or wrong of the said Mertz & Gibb; that they applied to said Norcross for an extension of time equivalent to the delay caused or to be caused by the strike, but that said Norcross refused to grant any delay or comply in any way with the said application; that Norcross had demanded of Mertz & Gibb the performance of work not theirs to do, but which had been left undone, or imperfectly done by other contractors, and that the refusal of the said Norcross Brothers to grant the desired delay was owing to the refusal of said Mertz & Gibb to do the other contractors' work at their own expense, and that while the strike was continuing the said Norcross Brothers wrongfully took advantage of the situation to try to force Mertz & Gibb to do the work which

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they had not agreed to do, and which by their contract it was not their duty to do, and wrongfully took away from them the privilege of completing their work, and entered upon the completion of the work themselves with the view and intent of charging all the work undone, whether theirs or not, to the said Mertz & Gibb, so as to absorb the moneys due and to become due to said Mertz & Gibb under the contract; that at the time of the filing of the notice of lien Mertz & Gibb had duly performed part of the conditions of said contract on their part to be performed, and so far completed the same as to become entitled, at the time of filing of said notice, to a payment on account of said contract, and at the time of filing said notice there was due and owing to said contractors and the subcontractors, Mertz & Gibb, from said owner, a sum in excess of the amount of plaintiff's lien thereon; that the plaintiff furnished to Mertz & Gibb certain building materials for and used in the construction and erection of said hospital and buildings on the premises of the owner, which said materials were reasonably worth the sum of \$16,020.18; that the plaintiff has been paid the sum of \$13,014.80, leaving the sum of \$3,005.38, with interest thereon, unpaid. By the agreement between Norcross and Mertz & Gibb, annexed to the complaint, Mertz & Gibb agreed to provide all the materials for and perform in a good and workmanlike manner under the direction of Norcross and according to the drawings and specifications of Robertson, architect, all the work mentioned as set forth in said drawings and specifications, which are to be considered as forming a part of this agreement; and they further agree to commence the work as soon as required by, and carry it forward as rapidly as permitted by the progress of the building, and to complete it in season not to delay the finishing of the buildings, "provided he is not obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the said first party, or of any other contractor employed upon the work, or by any damage which may happen by the action of the elements, or by the abandonment of the work by the employees through no default of his, in which event an extension of time equivalent to such delay shall be granted upon application to the said first party in writing within twenty-four hours of the occurrence of such delay;" that "in case of any failure or unreasonable delay of the said second party (Mertz &

Gibb) whether by act or default in the performance of any of the above stipulations or compliance with the true intent of these presents, not authorized in writing by the said party of the first part, it shall be lawful for the said party of the first part, after three days' notice in writing to said party of the second part, to provide other workmen and materials to complete the said work in the place of the said party of the second part, and to deduct the cost and charges thereby occasioned from the sums otherwise becoming due to the said party of the second part under this agreement without prejudice to any other remedy which the said party of the first part may have for breach thereof;" and Norcross agreed to pay to Mertz & Gibb when the terms of the contract are complied with, and upon sufficient evidence that all claims upon the building for work or materials up to the time of payment are discharged, the sum of thirty-five thousand three hundred and seventy dollars (\$35,370); this amount was to be paid in monthly installments in proportions as the work progressed, fifteen per cent being reserved to be paid within thirty days from completion of the work. This contract was dated the 16th day of April, 1900. It was not disputed but that the plaintiff furnished the materials specified in his complaint, and had received the amount on account thereof specified in the complaint, which left a balance due him from Mertz & Gibb of \$3,005.38.

Upon the trial the court found the making of this contract; that Mertz & Gibb entered into the performance of the work, and while so engaged, on the 10th of April, 1901, without any fault or negligence of Mertz & Gibb, the workmen in their employ, twenty-five or upwards in number, instigated and controlled by a walking delegate, struck and refused to work upon the job until Mertz & Gibb became reconciled to the delegate and the union; that on the 11th of April, 1901, Mertz & Gibb requested an extension of time equal to the length of the strike for the completion of their work under the contract, but that Norcross refused to grant the extension, and suggested that they wait a few days and see how the strike came out; that on the same day, in the morning, and without any notice to or permission from the said Mertz & Gibb, said Norcross wrongfully took the job out of their hands and proceeded to do the work himself, claiming that they were doing it for and on account of said

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Mertz & Gibb, and intending to charge the expense upon them; that at the time of taking the work out of the hands of said Mertz & Gibb there had been no unreasonable delay on the part of Mertz & Gibb, or failure on their part in the performance of any of the stipulations in the said contract or compliance with the true intent of the same, and that said Norcross neither served upon the said Mertz & Gibb a notice in writing to the effect that he intended to provide other workmen and materials to complete the said work in the place of said Mertz & Gibb, or any notice as prescribed in and by said contract, nor would he have been warranted in giving such a notice of terminating the contract with said Mertz & Gibb; that when said Norcross wrongfully took the work out of the hands of Mertz & Gibb they had performed extra work on written orders from said Norcross of the agreed value of \$788 and had received from the said Norcross on account of the contract the sum of \$29,048, leaving still unpaid on the contract and for extra work the sum of \$7,118; that the fair and reasonable cost of completing the work called for in the contract when said Norcross took possession as aforesaid was \$2,800; that the said Mertz & Gibb, if unmolested, would have finished the work and furnished what materials were used, and could have done so for this sum. As a conclusion of law, the court found that Norcross became indebted to the plaintiff in the sum of \$3,005.38, with interest, for which sum the plaintiff was entitled to judgment, and directed the enforcement of the mechanic's lien in the usual way.

The plaintiff relied upon the testimony of Mertz, one of the subcontractors, and there was introduced in evidence a considerable number of letters that passed between Norcross and Mertz & Gibb in relation to the performance of this contract. It would seem that as the work progressed cracks appeared in the plastering done by the plaintiff which Norcross required Mertz & Gibb to repair; that Mertz & Gibb insisted that these cracks were caused by defective work done by other contractors in constructing the walls upon which the plaster was placed by Mertz & Gibb, and Mertz & Gibb deliberately refused to make these repairs. On March 13, 1901, Norcross wrote to Mertz & Gibb stating that the architect had called his attention to certain cracks in the plaster work of the building and asked that they be repaired immediately; that "We under-

stand you refuse to do this for various reasons, and if you will refer to your specification you will find that your work was to be left perfect, and that no excuse would be taken for any defects caused by any other person's work — unless they were called to the architect's attention at the time the work was executed. We therefore, in accordance with our contract with you, call upon you to at once have the defective plaster work repaired." In answer to this letter Mertz & Gibb wrote, on March 22, 1901, stating that it was very evident that the cracks referred to were the result of construction, and could in no way be attributed to the shrinkage of white mortar, as claimed in Norcross' letter, and closing with this statement: "We have never at any time and do not at present refuse to make good any defective work on our part, and stand ready to do so in the present instance, but we do not consider it just to be held accountable for defects which are obviously the result of the workmanship of others." In reply, on March twenty-third, Norcross wrote, "We fully realize the difficulty in placing the responsibility of the cracks in the angles, but we are not prepared to admit that some of the trouble was not caused by some defect in the plaster work (either in the contraction of the mortar or by the unequal thickness of mortar); neither are we prepared to attribute the cracking to defective workmanship on the partitions," and after stating the reason which led them to conclude that at least some part of the defective work was that done by Mertz & Gibb, continued: "This being the case — and it being difficult to place the entire responsibility where it belongs — is the reason why we say to you that the easiest way and the best way would be to have the work properly repaired, and ask Roebling to pay a proper proportion of the expense." There seems to be no answer to this letter, but on March 30, 1901, Norcross again wrote to Mertz & Gibb stating that he was informed that they still refused to go on with the work under these conditions, and stating: "We now call upon you to perform your contract and finish that work, and turn it over to us in a manner satisfactory to the architect, as called for by the specification. * * * We have borne with a great deal of annoyance on this plastering, and we certainly shall not stand it any longer. We wish a large force of men put there to finish up the plastering of that building, otherwise we will have to take the matter into our own hands, in accordance with clause 3 of our con-

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tract; therefore, we hereby give you that notice." Upon the same day Mertz & Gibb replied to this letter as follows: "In reply to your favor of even date, would state that we refuse to do any repairing of any of the cracks caused by other's work and not attributed to any defective material or workmanship on our part. * * * We are ready to carry out our part of the contract, and expect you to do the same. In going over the second floor to-day we find a great many cracks in the angles caused by the floors." To this letter Norcross replied on April first and said: "We have already notified you that unless your work at that building was carried along in a more satisfactory manner, we should have to put on other men — according to clause 3 in your contract. We beg to call attention to a clause in your contract which reads as follows: In case any of said work done, or material provided by the said party of the second part, shall be unsatisfactory to the architect or to the said party of the first part, as your employers, then the said party of the second part will, on being notified thereof by the said first part,* immediately remove such unsatisfactory work or materials, and supply the place thereof with other work and materials satisfactory to the said architect and to the said first party. * * * We have shown you the easiest way out of the matter, which is to make the work good, and we will see that part of the amount is paid by the Roebling people; we do not ask you to look to the Roebling people at all. If you do not do this, we shall have to put on men to do the work and charge the expense to your account hereafter. We also find that after all our repeated notices to you, you have only 8 plasterers at work, when you should have at least 3 times that many," to which letter Mertz & Gibb replied on the same day, stating that they were taking men from other jobs to the hospital building, and hoped in a day or two to be going with full force. On April fourth Norcross wrote to Mertz & Gibb stating that in accordance with the clause in the contract he had put on men to cut out the cracks in the plastering and to repair them, calling upon them to select an arbitrator who would act with one selected by the other persons to determine who was responsible for the cracks, notifying Mertz & Gibb to smooth some plastering with sand paper and do the patching which was a part of

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their contract, and closing as follows: "In accordance with our former notice to you, unless you put men on this work at once, we will proceed to hire them and charge the same to your account. This work must not be delayed any longer by obstructions on your part."

Thus the situation on April fourth was that after repeated demands on Mertz & Gibb to do certain work which it was alleged they were bound to do under the contract, and which they had refused to do, Norcross had put men on to do this work, and then demanded that they proceed to do the balance of the work, or upon a failure to do so Norcross would, under the provisions of the contract, to which attention has been called, employ men to do this work and charge it to the amount to be paid by them to Mertz & Gibb. It is not disputed that Norcross had a right to give this notice, and it is not disputed that Norcross had a right to employ men to repair those cracks, whether Mertz & Gibb were bound to repair them under the contract or not. If Mertz & Gibb were not bound to repair them, then Norcross could not have charged against Mertz & Gibb the amount that they paid for repairing the cracks. If Mertz & Gibb were bound to repair those cracks, Norcross had the right to employ the men, as Mertz & Gibb had refused to do the work, and charge the amount to Mertz & Gibb upon the final completion of the work. Norcross, therefore, certainly was acting within his rights in employing these men, and to that certainly Mertz & Gibb could have no objection. At this same time, on April fourth, Mertz & Gibb were duly notified to complete their work under the contract, which they admitted they were bound to complete, and of the progress of which work constant complaint had been made in the correspondence before set out, and then distinct notice was given that unless they put men on the work at once Norcross would proceed to hire them and to charge the cost to their account; and that the work could not be delayed any longer by the obstruction on the part of Mertz & Gibb. Mertz & Gibb then had the notice provided for by the contract. They had then notice to complete the work under the contract which they conceded they were bound to do, or in default, Norcross would employ men to do the work and charge the cost to Mertz & Gibb. Up to this point this correspondence speaks for itself. Mertz & Gibb in their letters

seem to have conceded that the work was not progressing as required by the contract, for there were promises that more men would be put to work and that the work would progress satisfactorily. From the date of this letter of April fourth, Mertz testified that they were proceeding with the work under the contract ; that on April tenth the plasterers' delegate came in the building and Mertz had a conversation with him ; that about three days afterwards Mertz was notified by this delegate to come to the plasterers' union ; that he did not go to the rooms, and the next morning the men struck work on the building ; Mertz further testified that he had asked the plasterers' delegate whether he thought it was right that he should send some men to the building to repair certain cracks in the building without asking " us the cause of the trouble ;" that " he sent the men in there for Norcross Bros. over our head and Norcross Bros. and ourselves had some controversy in regard to these cracks before and without settling the question at all, through the delegate then, the superintendent put on some plasterers in the building in connection with our work, but they were working for Norcross Bros., and I asked the delegate whether he thought this was right, without asking us first the cause of the trouble ;" that to that the delegate said he did, whereupon Mertz asked him who he thought he was talking to ; that the delegate replied that " he did not give a d—— who he was talking to ;" that Mertz replied that " if he went on like that I would put him out of the building," whereupon they parted, and it was in consequence of this dispute that the strike was ordered ; that the delegate requested Mertz to go to the plasterers' union on Tuesday night, but Mertz refused to go, and the next day the men refused longer to work for him. This is the account which Mertz gives of the cause of the strike which resulted in the men leaving the work. Mertz evidently has the dates somewhat confused, as it seems to have been afterwards conceded on both sides that the strike happened on April tenth as a result of Mertz's refusal to confer with the plasterers' union on the ninth, and that, as this interview with the delegate happened two or three days before, it must have been the sixth or seventh of April, the notice to which attention has been called having been served upon Mertz & Gibb on the fourth of April. At any rate, on the tenth of April the men struck and Mertz testifies that he notified Norcross' superintendent of that fact.

Mertz testified, and the court found, that Norcross took the work out of the hands of Mertz & Gibb on the following day (April eleventh), but that seems to have been a mistake. Mertz confesses that he had no personal knowledge of what happened in the building after the men struck. Undoubtedly there were plasterers working at the building during the week, but it would appear that they were all plasterers who were employed by Norcross in repairing the cracks which Mertz & Gibb had been notified to repair, but which they had refused to repair as not called for by the contract.

On April sixteenth Norcross wrote a letter to Mertz & Gibb in which he said: "The matter of the delay to the plastering at the Lying-in Hospital building is assuming very serious proportions and we must now again call upon you for the last time to put in a sufficient number of men to finish it according to contract," and stating that the reason that the men refused to work was caused by the defendant's language to the delegate which was caused by the fact that he had brought the delegate to task for giving Norcross men to finish up the cracks in the plastering which Mertz & Gibb had refused to do; this "changes the strike aspect of the case entirely and leaves you responsible for the actions of the men; it is, therefore, your duty to at once go before the board as they requested you before, and have this matter settled once for all. We shall not wait any longer than this day at 6 o'clock as you have already had your three days' notice according to the contract. If you cannot furnish the necessary men after that time we will finish the plastering ourselves at the least possible expense and charge it to your account." No answer appears to have been received to the letter, whereupon Norcross went on and completed the work, and there was undisputed testimony that they paid out an amount largely in excess of that remaining unpaid upon the Mertz & Gibb contract. On April tenth the men refused to work for Mertz & Gibb and after that they made no attempt to complete the work; never expressed any willingness to proceed, simply abandoned it until August seventh when, in consequence of financial difficulties, a receiver of the firm was appointed.

Now, these facts are not disputed. They are conceded by subsequent letters from Mertz & Gibb to Norcross, and there is no evidence to show that Mertz & Gibb could possibly at any time after

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the tenth of April have procured workmen to complete their contract. Unless they are relieved from their obligation to finish this work by reason of the clause of the contract to which attention has been called, it would seem to be clear that at the time the lien was filed there was no money due to Mertz & Gibb and that no money subsequently became due. The contract expressly provides that the work is to be pushed forward as rapidly as possible provided Mertz & Gibb are not obstructed or delayed in the prosecution or completion of the work "by the abandonment of the work by the employees through no default of his, in which event an extension of time equivalent to such delay shall be granted upon application to the said first party in writing within twenty-four hours of the occurrence of such delay."

For several reasons it appears to me that upon the undisputed testimony Mertz & Gibb have not brought themselves within this provision of the contract. In the first place, no application in writing was presented to Norcross within twenty-four hours of the happening of the delay. Mertz swears that he saw Norcross' manager and Norcross advised him to wait a day or two and see what would happen, but no written application for an extension of time in writing was made. The delay continued according to the clear weight of the evidence until the sixteenth before anything was done, upon which day Mertz & Gibb were notified that unless they procured men on the next day, Norcross would take charge of the work himself. They made no answer to this application at all; and, so far as appears, never made any attempt after that to complete the work.

In the second place it is apparent that the cause of the strike was through the default of Mertz & Gibb. What men he had at work were working on the building, when Mertz himself called the plasterers' delegate to account for furnishing Norcross with men to fill up the cracks in this building. Norcross had again and again called on Mertz & Gibb to perform that work. They had refused. Norcross had given them notice under the contract that in case of their continued refusal Norcross would do that work. Mertz & Gibb had still refused, and Norcross had a perfect right to do the work. The question as to who was to pay for it was to be determined thereafter. It certainly was no business of Mertz & Gibb to inter-

fere with Norcross in doing the work, or to call the plasterers' association to account because they allowed their men to do that work. According to Mertz's own account, his language to the delegate in consequence of that dispute was the cause of the strike. It certainly cannot be said that such a strike was "through no default of his." Norcross was constructing an expensive building, the necessity of the situation requiring that the various sub-contractors should keep up with their work. Mertz & Gibb's delay in the performance of their contract had been the cause of remonstrance after remonstrance from Norcross, and certainly there must have been some time at which the situation absolutely required Norcross to take the work out of their hands and complete it. Here, the whole work was suddenly brought to a stop by the men refusing to work longer for Mertz & Gibb, and this refusal brought on by the unreasonable and unjustifiable complaint of Mertz that Norcross had been allowed to obtain men to do his own work, without the consent of Mertz & Gibb. Mertz & Gibb never did make up their dispute with the union and, so far as appears, were never thereafter able to complete this work; and I think that upon the overwhelming weight of evidence it is quite apparent that this whole difficulty was caused by the neglect and refusal and inability of Mertz & Gibb to complete the work that they had agreed to do and to comply with their contract.

I also think that by a great preponderance of evidence the amount of work that Mertz & Gibb left undone at the time the contract was in effect abandoned by them was much in excess of the amount which, according to Mertz's testimony, was unfinished at the time they abandoned the work. The whole testimony upon which the finding that work of the value of \$2,800 remained to be done to entitle Mertz & Gibb to the total amount to be paid to them under the contract was based upon the testimony of Mertz. He testified as to the work that remained to be completed and that it would cost \$2,800 to finish it. He is contradicted by his letter that he wrote to the defendant on May first. That letter pretends to give a brief statement of the facts showing the present relations of the parties to the contract, and says: "We have performed all of the work under our contract, except about \$8,800 worth. We are unable to complete that, on account of the abandonment of the

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work by our employees. We claim that this abandonment was without any default on our part. You claim that the abandonment was a strike, alleged to have been induced by our conduct toward the delegate of a labor union." Mertz when confronted with this letter admits that he dictated it, that he read it over, signed it and sent it, but he states that he did not mean to say that there was \$8,800 worth of work not finished, but that he was to receive that amount from Norcross when the contract was completed; but the letter shows that that could not have been his meaning. He was speaking of the completion of the contract, not of the amount that he would be entitled to receive upon the completion of the contract; and from the whole letter it is quite evident that it was written under what he speaks of in his letter, as the advice of "reliable counsel." It is not conceivable that a carefully prepared letter, written under the advice of counsel, could have contained such a mistake as Mertz seeks to show that it contained; and in the face of the evidence by the defendant showing that a much larger amount of work was undone than that testified to by Mertz, and that the cost of doing that work was several thousand dollars more than the total amount that would have been payable to Mertz & Gibb by Norcross, if they had completed their work, I do not think that the finding that the work left undone amounted to \$2,800 was sustained by the evidence.

Taking this controversy as it stands, the question is whether the plaintiff, who furnished Mertz & Gibb with materials to do their work, or Norcross, who was compelled to do the work left undone by Mertz & Gibb, at an expense in excess of what Mertz & Gibb were to receive, is to bear the loss; to impose a liability for that loss upon Norcross it must appear that Norcross did owe Mertz & Gibb the amount that the plaintiff claimed from Mertz & Gibb. It seems to me that if Mertz & Gibb had been plaintiffs and were suing Norcross to recover a balance due upon a contract, that Norcross could not be held liable, and as the plaintiff can only recover the amount that was due by Norcross to Mertz & Gibb, I think that there was nothing due and that the plaintiff was not entitled to recover. The order given by Mertz & Gibb in favor of plaintiff and which was accepted by Norcross, does not justify a recovery against Norcross, because, so far as appears, all moneys agreed to be paid to plaintiff, except the twenty-five per cent of the

value of the materials furnished, had been paid, and as that twenty-five per cent was to be paid out of the amount due on the last payment to Mertz & Gibb when the plastering work was finished, and as no last payment ever became due to Mertz & Gibb, they never having finished the plastering work, nothing was due to the plaintiff.

It follows that the judgment appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., McLAUGHLIN, HATCH and LAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

PIETRO RONCORONI, Respondent, v. RUDOLPH GROSS and ALEXANDER J. GROSS, Doing Business under the Firm Name and Style of THE AMERICAN CONSERVE COMPANY, Appellants.

An order adjudging a party guilty of a criminal contempt must set forth the particular circumstances.

An order adjudging the defendants in an action guilty of a criminal contempt for disobeying an injunction *pendente lite*, which does not set forth the particular circumstances of the offense, as required by section 11 of the Code of Civil Procedure, is fatally defective; a general statement that the defendants disobeyed the injunction order is insufficient.

APPEAL by the defendants, Rudolph Gross and another, doing business under the firm name and style of The American Conserve Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 23d day of December, 1903, adjudging the defendants guilty of a criminal contempt of court in disobeying an order entered in this action on the 30th day of November, 1903.

Edward Hymes, for the appellants.

Louis Steckler, for the respondent.

VAN BRUNT, P. J. :

Throughout the papers in this case the orders are spoken of as being the orders of the justice who directed their entry. It will be

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observed that they were not judge's orders, but orders of the court, and should have been styled as such, they not being orders of the justice, but of the court over which he presided.

On the 30th of November, 1903, an order was entered in this action enjoining and restraining the defendants during its pendency and until the further order of the court from in any manner using the words "Conserva Di Tomate" as a description of any tomato preserves or paste, etc. It being claimed by the plaintiff that the defendants violated this injunction on the 11th of December, 1903, an order to show cause was procured requiring them to show cause why they should not be punished as and for a contempt of court, because of the violation of the injunction above mentioned.

Upon the hearing of this motion evidence amply sufficient to justify the conviction of the defendants of such violation was presented to the court, and thereupon an order was entered granting the motion, and ordering that the defendants and each of them be punished as and for a criminal contempt in disobeying the order entered herein on the 30th of November, 1903, and fining the defendants the sum of \$100.

From this order the defendants have appealed, and the only question which it is necessary to consider upon this appeal is as to the sufficiency of the order adjudging the defendants guilty of contempt, it being claimed that it does not comply with the provisions of the Code in reference to criminal contempts, in that it fails to set out or describe the act or acts constituting the alleged contempt. This objection seems to be well taken. Section 8 of the Code of Civil Procedure defines criminal contempts, under the 3d subdivision of which section the acts of the defendants would fall. Section 9 provides for the punishment for criminal contempts; section 10 provides for the procedure for the punishment for such contempts when committed in view of the court or otherwise; and section 11 specifies the requisites of commitment. It is as follows: "Where a person is committed for such a contempt the particular circumstances of his offence must be set forth in the mandate of commitment."

In the case at bar there is a general statement of the disobedience of the order of the 30th of November, 1903, but the particular circumstances which constituted such disobedience are nowhere set

forth in the order appealed from. The requirements, therefore, of section 11 of the Code of Civil Procedure have not been complied with, and the order is improper for that reason.

The order should be reversed, with ten dollars costs and disbursements, and remitted to Special Term for further action.

PATTERSON, INGRAHAM, HATCH and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and matter remitted to Special Term for further action.

FANNIE S. WHEELER, Respondent, v. WILLIAM F. NORTON and
WILLIAM DALTON, Appellants.

Negligence and trespass — complaint alleging facts establishing both — injury to a water pipe from blasting for a subway, causing the flooding of plaintiff's premises — the proximate cause is the one setting the other cause in operation.

Sub-contractors engaged in excavating the rapid transit subway in the city of New York, who, in the process of blasting rock, break a water main, the water from which flows upon and injures adjoining property, are liable in trespass to the owner of such property.

Where it appears that the sub-contractors placed the dynamite with which the blasting was done within a foot of the water pipe, which was nearer than the rules of the department of water supply permitted, and that they neglected to turn off the water or to protect the pipe in any way, although they had been previously warned of the danger of breaking the pipe, and that the rock could have been removed by other methods, which, if employed, would not have injured the pipe, liability on the part of the sub-contractors may be predicated on the ground of negligence.

The fact that the water pipe was laid, in violation of the rules of the water department, upon rock, and not upon soft material, does not excuse the sub-contractors from liability, as the proximate cause of the breaking of the pipe was the blast and not the manner in which the pipe was laid.

The proximate cause is the efficient cause, the one which necessarily sets the other cause in operation.

Where the complaint in an action is so framed as to permit a recovery either upon the ground of trespass or negligence, and the trial is conducted on the theory that a recovery can be had on either ground, and judgment is rendered against the defendants without specifying the ground of liability, the fact that the trial justice, as indicated in a memorandum made by him, held that the defendants were liable in trespass, does not prevent the Appellate Division from affirming the judgment on the ground that the defendants were guilty of negligence if the evidence is sufficient to sustain a finding to that effect.

APPEAL by the defendants, William F. Norton and another, from an order of the Appellate Term of the Supreme Court, first department, entered in the office of the clerk of said court on the 9th day of November, 1903, as resettled by an order entered in said clerk's office on the 25th day of November, 1903, affirming a judgment of the Municipal Court of the city of New York, borough of Manhattan, in favor of the plaintiff, entered in the office of the clerk of said Municipal Court on the 9th day of March, 1903, and also (as stated in the notice of appeal) from a judgment entered in the office of the clerk of the said Municipal Court on the 14th day of November, 1903, upon said order of affirmance.

L. Laflin Kellogg, for the appellants.

Jacob Marks, for the respondent.

McLAUGHLIN, J. :

The defendants, the sub-contractors engaged in excavating for the rapid transit subway in the city of New York, on the 8th of August, 1901, by blasting rock, broke a twelve-inch water pipe from which water escaped, flowed onto premises occupied by the plaintiff, and injured her property, and this action was brought to recover the damages sustained. She had a judgment in the Municipal Court of the city of New York, which was affirmed by the Appellate Term, and defendants, by permission, have appealed to this court.

The complaint is framed so as to permit a recovery either for trespass or negligence, which fact seems to have been entirely satisfactory to the defendants, inasmuch as so far as appears they made no effort either before or at the trial to compel the plaintiff to elect upon which ground she would claim a recovery, and the trial seems to have proceeded upon the theory that a recovery might be had upon either ground, as evidence was introduced which tended to establish both trespass and negligence.

The trial court, as appears from a memorandum of the trial justice, held the defendants liable as trespassers and this seems to have been the view of the Appellate Term on the reargument, although on the first argument defendants were held liable as for negligence.

I think the defendants were liable as trespassers for the damage done to plaintiff's property. It has been held by a long line of authorities in this State that throwing rocks or debris upon another person's property, thereby causing him damage, makes one liable as a trespasser, and this irrespective of whether such person be guilty of negligence or not. I am unable to see any distinction between causing damage to property by water and causing it by rocks and debris. A leading case on the subject is *Hay v. Cohoes Co.* (2 N. Y. 159). There, defendant, in blasting upon its own land, threw fragments of rock against plaintiff's house which stood upon land adjoining. No proof of negligence in blasting was established, but defendant was, nevertheless, held liable. GARDINER, J., delivering the opinion (and his remarks are as applicable to the case before us as they were there), said: "The defendants had the right to dig the canal. The plaintiff, the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For, if the defendants in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might for the same purpose, on the exercise of reasonable care, demolish his house and thus deprive him of all use of his property. * * * He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner."

This case was followed in *Tremain v. Cohoes Co.* (2 N. Y. 163), cited with approval in *St. Peter v. Denison* (58 id. 416), and in *Mairs v. Manhattan Real Estate Association* (89 id. 498). In the *Mairs* case defendant was held liable without proof of negligence for making an excavation upon its own land, through which, during

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a heavy rain, water found its way into the cellar of the adjoining owner—and this notwithstanding the fact the excavation was made under a license from the municipal authorities. Judge RAPALLO, delivering the opinion of the court, said: "The rights of the parties in such a case do not depend upon the same principles as in cases where the wrong complained of consists of an interference with a public highway to the injury of the traveling public; but upon the principle of *Hay v. Cohoes Co.* (2 N. Y. 159); *St. Peter v. Denison* (58 id. 416; 17 Am. Rep. 258); *Jutte v. Hughes* (67 N. Y. 267), in which it is held that where one is making improvements on his own premises, or without lawful right, trespasses upon or injures his neighbor's property by casting material thereon, he is liable absolutely for the damage, irrespective of any question of care or negligence. A license from the municipal authorities cannot affect the question of responsibility in such cases."

The *Hay* case was also cited with approval, and the doctrine there announced reaffirmed in the recent case of *Sullivan v. Dunham* (161 N. Y. 290), Judge VANN saying: "We think that the *Hay* case has always been recognized by this court as a sound and valuable authority. After standing for fifty years as the law of the State upon the subject, it should not be disturbed, and we have no inclination to disturb it. It rests upon the principle founded in public policy that the safety of property generally is superior in right to a particular use of a single piece of property by its owner. It renders the enjoyment of all property more secure by preventing such a use of one piece by one man as may injure all his neighbors."

Here the act of the defendants broke the pipe which caused the water to flow upon plaintiff's land and do her damage. Their act was the direct and proximate cause of her injury, and they should make good the same, whether their act was a negligent one or not. One person cannot use his property to the detriment of his neighbor without making good the loss sustained. Had the plaintiff's property been injured by a piece of the pipe being thrown on her premises I do not believe, under the authorities cited, it could be seriously questioned but what the defendants would be liable as trespassers, and I am unable to see any distinction between iron thrown and water flowing thereon.

- If I am correct in this conclusion, then it necessarily follows

that the judgment is right and must be affirmed, and this irrespective of whether the defendants were negligent in putting off the blast.

I am also of the opinion that the evidence was sufficient to justify a recovery upon the ground of negligence. The complaint, as already indicated, was framed and the trial evidently proceeded upon the theory that a recovery might be had upon this ground as well as trespass, and the fact that the trial justice, as indicated in his memorandum, held defendants liable for a trespass does not prevent an affirmance of the judgment on the ground of negligence, if the evidence is sufficient to sustain a finding to this effect. The memorandum of the trial justice is no part of the judgment itself, nor does it exclude the idea that the judgment was not the result of, or based upon, a finding of negligence. The evidence is amply sufficient to sustain a finding of negligence. Bearing upon this question, it appeared that prior to the time the pipe was broken defendants drilled holes for the purpose of blasting within a foot or so of the place where the break subsequently occurred, which were nearer to the pipe than the rules of the department of water supply permitted; that a quantity of dynamite was exploded in some or all of these holes without taking the precaution to turn off the water, which might have been done, or to protect the pipe in any way. Not only this, but it also appeared that the rock which was blasted could have been removed by "wedging" or by breaking it with a hammer, and if either method had been employed the pipe would not have been broken, and that the defendants' foreman, prior to the accident, was told that he would "burst that pipe * * * if you are not careful," to which he responded: "I will take care of the pipe." The use of high explosives, under the circumstances here detailed, in such close proximity to a twelve-inch water main, through which the water was flowing, was a careless act, and one which a careful and prudent person would not have done, especially when the same result could have been accomplished without the use of such means. (*Booth v. R., W. & O. T. R. R. Co.*, 140 N. Y. 267.)

But it is urged that if defendants were negligent they cannot be held liable for the damages sustained, inasmuch as their negligence was not the proximate cause of the damage. What is claimed

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in this respect is that the pipe was laid, in violation of the rules of the water department, upon rock and not upon soft material. As already said, the defendants put off the blast. This broke the pipe, and was the proximate cause of plaintiff's damage. (*Laidlaw v. Sage*, 158 N. Y. 73.) The proximate cause is the efficient cause, the one which necessarily sets the other cause in operation.

Upon both grounds, therefore, I think the determination is right and should be affirmed, with costs. The appeal from the judgment should be dismissed.

VAN BRUNT, P. J., O'BRIEN and HATCH, JJ., concurred; INGRAM, J., concurred on last ground.

Judgment affirmed, with costs.

THOMAS B. HIDDEN, Respondent, v. FRED S. GODFREY and Others,
Defendants, Impleaded with MARION E. D. VAN DYKE,
Appellant.

Judgment of mortgage foreclosure, entered after an answer was overruled as frivolous — order overruling answer reversed on appeal — the Special Term must vacate the judgment.

One of the defendants in an action to foreclose a mortgage on real property interposed an answer which was overruled as frivolous. A judgment of foreclosure was entered September 17, 1903, pursuant to which the premises were sold on October 14, 1903. The purchaser at the sale refused to take title on the ground that the judgment was illegal and that an appeal had been taken from the order overruling the answer. An order was subsequently entered directing that the premises be resold unless the purchaser, on or before October 14, 1903, completed the purchase. Prior to October 14, 1903, the order overruling the answer as frivolous and directing judgment for the plaintiff was reversed by the Appellate Division. Thereupon the answering defendant moved for an order vacating the judgment and setting aside the sale. The court denied the motion, but stayed the plaintiff from readvertising the sale until after the determination of the issues raised by the defendant's answer.

Held, that the answering defendant was entitled to have the judgment vacated, as the judgment of foreclosure necessarily fell with the reversal of the order overruling the answer as frivolous and directing the entry of judgment;

That the Special Term had no discretion, but was required to vacate the judgment of foreclosure upon the application of the answering defendant;

That the question as to what effect should be given to the sale should be determined after the trial of the issues raised by the answer and in a proceeding to which the purchaser was a party.

APPEAL by the defendant, Marion E. D. Van Dyke, from so much of an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of January, 1904, as denies said defendant's motion to vacate and set aside a judgment of foreclosure and sale theretofore entered in the action as well as the sale had thereunder.

Franklin Bien, for the appellant.

William D. Gaillard, for the respondent.

McLAUGHLIN, J. :

This action was brought to foreclose a mortgage for \$80,000 upon certain real estate in the city of New York. The defendant Van Dyke interposed an answer which was overruled upon the ground that it was frivolous, and a judgment of foreclosure was entered on the 17th of September, 1903. On the 14th of October, 1903, a sale was had in pursuance of the judgment and the premises purchased by one Corwin for \$141,000 — ten per cent of the purchase price being paid to the referee at the time of the sale. Corwin thereafter refused to complete the purchase, he having been notified by the attorney of the appellant that the judgment was irregular and that an appeal had been taken from the order overruling the answer interposed by the appellant. Subsequently, upon application, an order was entered directing that the premises be resold unless Corwin, on or before the 14th of December, 1903, complete the purchase, and upon such resale he be held liable for any deficiency which might arise. Prior to the 14th of December, 1903, the order overruling the answer as frivolous and directing judgment for the plaintiff was reversed by this court and the motion for judgment denied (*Hidden v. Godfrey*, 88 App. Div. 496), and thereupon the appellant moved for an order vacating the judgment and setting aside the sale. The motion was denied, but the plaintiff was stayed from readvertising the sale until after the issues raised by the defendant's answer had been disposed of. It is from this order that the present appeal is taken.

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I think the motion, in so far as it asked to have the judgment vacated, should have been granted. This court had, prior to the time the motion was made, determined that the order overruling the appellant's answer as frivolous was erroneous and that the motion for judgment on the answer as frivolous should have been denied. This determination was binding upon the Special Term and should have controlled its action when the motion was thereafter made to vacate the judgment. When this court reversed the order overruling the answer as frivolous and directing the entry of judgment, the judgment itself necessarily fell, inasmuch as this determination left an issue raised by the pleadings in the action to be tried and disposed of before any judgment could be entered. It is no answer to the suggestion that the appellant under the decision of this court was entitled to have the judgment vacated, to say that the disposition made by the Special Term protects whatever rights she has. It does not do that. The plaintiff has a judgment against her to which he is not entitled and necessarily cannot be until the issues raised by the answer have been tried. Nor was there any discretion in the Special Term after this court reversed the order and denied the motion, but to vacate the judgment when application was made for that purpose.

As to the sale, it is unnecessary to determine at this time what effect should be given to it. That question can be determined after the issues raised by the answer have been tried and in a proceeding in which the purchaser is a party. (*Schieck v. Donohue*, 81 App. Div. 168.)

It follows that the order appealed from must be reversed so far as it denied the motion to vacate the judgment, and to that extent the motion should be granted, with ten dollars costs and disbursements of appeal and ten dollars costs of motion.

VAN BRUNT, P. J., O'BRIEN and LAUGHLIN, JJ., concurred; PATTERSON, J., concurred in result.

Order reversed so far as it denied motion to vacate judgment, and to that extent motion granted, with ten dollars costs and disbursements of appeal and ten dollars costs of motion.

In the Matter of the Application for Letters of Administration on the Goods, Chattels and Credits Left Unadministered of ROSE FERRIGAN, Deceased.

LAWYERS' SURETY COMPANY OF NEW YORK, Appellant ; A. NICHOLAS SHERIDAN and Others, Respondents.

Letters of administration — they cannot be granted to a non-resident alien nor to a resident designated by him — he is not "contingently" entitled to letters — who is — the public administrator is entitled either absolutely or contingently.

Rose Ferrigan, a resident of the city of New York, who had personal property therein, died, leaving as her sole next of kin a sister, Margaret Kehun, residing at Dundalk, Ireland. John Flynn, of Providence, R. I., was appointed administrator of her estate, and acted as sole administrator until his death, which occurred July 7, 1902.

The said Margaret Kehun died September 24, 1902, leaving her surviving as her sole next of kin a son, William Henry Kehun, of Liverpool, England. Prior to her death, she assigned all her interest in the Ferrigan estate to one Sheridan, of Dundalk, Ireland. Subsequent to Flynn's death, Sheridan, through an attorney, filed a petition in the Surrogate's Court, for letters of administration *de bonis non* of the goods, chattels and credits of the said Rose Ferrigan.

Held, that the Surrogate's Court had no authority to appoint the attorney who filed the petition for Sheridan (the public administrator having refused to act) administrator *de bonis non* of the estate of the said Rose Ferrigan;

That there is no statutory provision by which a non-resident alien can obtain letters of administration for himself or another upon a petition filed by him for that purpose;

That Sheridan was not "contingently" entitled to the letters of administration, within the meaning of section 2662 of the Code of Civil Procedure;

That the word "contingently," as used in this section, means a person to whom, at the time the petition was filed, letters would issue, if persons having a prior right thereto under section 2660 of the Code of Civil Procedure did not take;

That the public administrator of the county of New York was entitled, either absolutely or contingently, to letters of administration on the estate, and that, if any reason existed why such letters should not issue to him, some other suitable person might be appointed.

APPEAL by the Lawyers' Surety Company of New York from an order of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 25th day of November, 1903, granting letters of administration upon the estate of Rose Ferrigan, deceased.

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Carlisle Norwood, for the appellant, Lawyers' Surety Company.

George H. Starr, for the respondent Sheridan.

William T. Carlisle, for the respondent Kehun.

McLAUGHLIN, J. :

On the 15th of October, 1893, Rose Ferrigan, a resident of the city of New York, having personal property therein, died leaving her surviving a sister, Margaret Kehun, her only next of kin, who resided at Dundalk, Ireland. Upon the death of Mrs. Ferrigan, John Flynn, of Providence, R. I., and Mrs. Jennie Tinney, of New York, were appointed her administrators. They qualified and acted as such until the 15th of April 1898, when Mrs. Tinney was removed and thereafter Flynn acted as sole administrator until his death, which occurred on the 7th of July, 1902, the Ferrigan estate not then having been fully administered. Mrs. Kehun died on the 24th of September, 1902, leaving her surviving as her next of kin an only son, William Henry Kehun, who resides at Liverpool, England. Shortly prior to her death she assigned — apparently upon the supposition that her son was dead, as appears from statements in the assignment — all of her interest in the Ferguson estate to A. Nicholas Sheridan, then and ever since a resident of Dundalk, Ireland. Subsequent to the death of Flynn, Sheridan, through an attorney of this court, filed a petition in the Surrogate's Court for letters of administration *de bonis non* of the goods, chattels, etc., of Rose Ferrigan, deceased. Upon the return of the citation issued upon the petition the application of Sheridan was opposed by the Lawyers' Surety Company, the surety upon Flynn's bond, upon the ground that the petition of Sheridan was insufficient to give the court jurisdiction to appoint an administrator. The opposition of the surety company was ineffectual, and an order was entered appointing (the public administrator having refused to act) the attorney who filed the petition for Sheridan, and the surety company has appealed.

I am of the opinion that the order should be reversed. The Surrogate's Court is a court of limited jurisdiction. It has such powers as the statute gives it and no more. (See Code Civ. Proc. § 2472

et seq.) Therefore, unless there be some statutory provision by which a non-resident alien can obtain letters for himself or another, upon a petition filed by him for that purpose, there was no authority in the court to entertain the petition filed. We have been unable to find any such authority in the statute; on the contrary, section 2661 of the Code of Civil Procedure expressly provides that letters of administration shall not be granted to a person not a citizen of the United States unless he is a resident of the State. Sheridan is not a citizen of the United States, nor is he a resident of the State of New York; on the contrary, the fact is not disputed that at the time the petition was filed he was a resident of Dundalk, Ireland. He could not, therefore, obtain letters for himself, and he could not authorize any one to do for him what he is precluded from doing. (*Sutton v. Public Administrator*, 4 Dejn. 33.) Nor is there force in the suggestion that he could, under section 2662 of the Code of Civil Procedure, present to the Surrogate's Court a petition asking for letters, inasmuch as he was "contingently" entitled to letters himself. But he is not "contingently" entitled to letters. The word "contingently" as used in this section means a person to whom, at the time the petition is filed, letters would issue if persons entitled thereto in priority under section 2660 did not take. Here, when the petition was filed Sheridan could not obtain letters, nor could he file a petition for letters because he was not then "contingently" entitled thereto, and he could not be, not being a citizen of the United States, until he became a resident of this State.

If we are right in this conclusion then it necessarily follows that the Surrogate's Court did not have jurisdiction to entertain the application of Sheridan, and for that reason the order appealed from must be reversed and the proceeding dismissed. The public administrator of the county of New York is either absolutely or contingently entitled to letters of administration on this estate (Code Civ. Proc. § 2660), and he can, therefore (*Id.* § 2662), apply for the same, and if any reason exists why letters should not issue to him, that fact being made to appear, some other suitable person can be appointed.

The order appealed from, therefore, is reversed, with ten dollars costs and disbursements against the respondent Sheridan, and the

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proceeding instituted upon his petition dismissed, with costs in the court below.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements against the respondent Sheridan, and the proceeding instituted on his petition dismissed, with costs in the court below.

In the Matter of the Application for Letters of Administration on the Goods, Chattels and Credits of JOHN FLYNN, Late of Providence, Rhode Island, Deceased.

MARY ANN FLYNN and Others, Appellants; A. NICHOLAS SHERIDAN and Others, Respondents.

Letters of administration — they will not be granted on the application of a non-resident alien to the public administrator — the public administrator or next of kin must petition therefor — a claim against an estate within the jurisdiction of a surrogate is property within his county — the public administrator is "contingently" entitled to letters.

Rose Ferrigan, a resident of the city of New York, who had personal property therein, died, leaving as her sole next of kin a sister, Margaret Kehun, residing at Dundalk, Ireland. John Flynn of Providence, R. I., was appointed administrator of her estate and acted as sole administrator until his death, which occurred July 7, 1902.

The said Margaret Kehun died September 24, 1902. Prior to her death, she assigned all her interest in the Ferrigan estate to one Sheridan, a resident of Dundalk, Ireland.

At the time Flynn died, there was pending, undetermined, a proceeding by him for an accounting as administrator, in which proceeding he had interposed a claim of upwards of \$6,000 against the Ferrigan estate which consisted of upwards of \$9,000. After Flynn's death, Sheridan, through an attorney, filed a petition in the Surrogate's Court, in which he asked that letters of administration be issued upon Flynn's estate to the public administrator, which application was opposed by the next of kin of Flynn.

Held, that the Surrogate's Court had no jurisdiction, upon such application, to grant letters of administration upon the estate of Flynn to the public administrator unless some one or more of the next of kin of Flynn should apply for such letters within a specified time;

That Sheridan being a non-resident alien, the surrogate could not issue letters to him nor entertain a petition presented by him or another acting in his behalf for the issuance of letters;

That the existence of the claim made by Flynn against the estate was sufficient to give the Surrogate's Court jurisdiction, upon a proper application, to issue letters of administration upon his estate;

That the public administrator was absolutely or contingently entitled to letters and that, upon an application duly filed by him, letters could be issued to him unless the next of kin of Flynn should see fit to make the application.

APPEAL by Mary Ann Flynn and others from an order of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 25th day of November, 1903, granting letters of administration upon the estate of John Flynn, deceased.

Carlisle Norwood, for the appellants.

George H. Starr, for the respondent Sheridan.

McLAUGHLIN, J. :

This appeal is from an order appointing the public administrator of the county of New York administrator of the estate of John Flynn, deceased. The facts, with few exceptions, are similar to the facts involved in the appeal in *Matter of Ferrigan* (*ante*, p. 376). and for that reason it is unnecessary to state them at length. Flynn, at the time of his death, was a resident of Providence, R. I. He died on the 7th of July, 1902, and there was then pending and undetermined in the Surrogate's Court of the county of New York a proceeding for an accounting by him as administrator of the estate of one Rose Ferrigan, deceased. He had in his possession, as such administrator, belonging to the Ferrigan estate, property of the value of \$9,000 or upwards, against which he had made a claim of upwards of \$6,000. At the death of Mrs. Ferrigan her only next of kin was a sister, a Mrs. Kehun, a non-resident alien who resided at Dundalk, Ireland, and who died September 24, 1902. Shortly before her death Mrs. Kehun assigned all her interest in the Ferrigan estate to A. Nicholas Sheridan, a non-resident alien, who also resided in Dundalk, Ireland. Upon the death of Flynn, Sheridan, through an attorney of this court, filed a petition in the Surrogate's Court, in which he asked that letters of administration be issued upon Flynn's estate to the public administrator. The appli-

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cation, although opposed by the next of kin of Flynn, was granted and the public administrator appointed, "unless some one or more of next of kin" of Flynn should apply for letters of administration upon that estate and qualify as such within ten days after the service of a copy upon them of the order appealed from, and they have appealed. The order appealed from must be reversed, and for the reasons stated in the opinion delivered in *Matter of Ferrigan* (*supra*). Sheridan, being a non-resident alien, could not obtain letters himself, nor was the surrogate authorized to entertain a petition for letters, whether the same was presented by him or another acting in his behalf.

In addition to the foregoing it is also urged that the surrogate did not have jurisdiction to issue letters, inasmuch as there was no property belonging to Flynn in the State of New York. We are, however, of the opinion that the claim made by Flynn against the Ferrigan estate, the validity of which was being determined in the Surrogate's Court at the time of his death, was sufficient to give the court jurisdiction, and upon a proper application letters could be issued. The public administrator is absolutely or contingently entitled to letters (Code Civ. Proc. §§ 2660, 2662), and upon a petition duly filed by him, unless the next of kin see fit to make the application, letters can be issued to him.

The order appealed from, therefore, must be reversed, with ten dollars costs and disbursements against the respondent Sheridan, and the proceeding instituted upon his petition dismissed, with costs in the court below.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements against the respondent Sheridan, and the proceeding instituted upon his petition dismissed, with costs in the court below.

ARCHTBALD A. HUTCHINSON and VICTOR K. McELHENY, JR., on Behalf of Themselves and all Other Stockholders of the AMERICAN MALTING COMPANY Similarly Situated, Respondents, v. JOHN W. SIMPSON and THOMAS THACHER, as Executors, etc., of JOHN G. MOORE, Deceased, and Others, Appellants, Impleaded with AMERICAN MALTING COMPANY, Defendant.

Action by stockholders in behalf of the corporation to recover stock alleged to have been improperly issued to parties engaged in its organization — what instrument of subscription for stock of the corporation constitutes a contract with the parties to whom the stock was issued, and not with the corporation — what does not create fiduciary relations between such parties and the corporation — any wrong done must be remedied in an action by the subscribers.

The complaint in an action brought by stockholders of the American Malting Company against the corporation, the members of the brokerage firm of Moore & Schley and one Eicks, to compel Moore & Schley to account to the corporation for 5,000 shares of its preferred stock and 77,400 shares of the common stock, alleged that prior to the incorporation of the American Malting Company, Moore & Schley secured options for the purchase of a number of malting plants and caused such options to be taken in the name of the defendant Eicks, who was in their employ, for their benefit; that immediately prior to the organization of the corporation, Moore & Schley invited subscriptions to the stock thereof by the following letter:

“ MESSRS. MOORE & SCHLEY:

“ GENTLEMEN.— Each of the undersigned agrees to take the number of shares set opposite his signature hereto of the preferred stock and one-half that number of shares of the common stock of a company to be organized to manufacture and deal in malt with a capital of \$30,000,000, one-half thereof to be 7% cumulative preferred stock and the remainder common stock, and to pay therefor the amount likewise set opposite his signature to the Guaranty Trust Company of New York, at its office in New York City, as and when called for by said trust Company.

“ It is expected that of the capital aforesaid all but two and one-half millions of preferred and one and one-quarter million dollars of common stock, to be reserved in the treasury for further corporate uses, will be issued in acquiring certain malt properties on which you and your associates hold options (or other value as you may determine in lieu of any thereof that may not be acquired) and for working capital and that a part of the stock so to be issued, to wit: nine million dollars of preferred and four and one-half million dollars of common heretofore underwritten, will be sold upon the terms above stated, deliverable when and if issued.

“ Dated New York, September 27th, 1897

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Signatures.	No. of Shares of Preferred Stock.	Prices.

The complaint further alleged that this letter was signed by a large number of persons who agreed to take the \$9,000,000 in preferred stock and \$4,500,000 in common stock therein mentioned and to pay therefor the sum of \$9,000,000; that Moore & Schley procured the American Malting Company to be incorporated with a capital of \$30,000,000, \$15,000,000 of which was preferred stock and \$15,000,000 common stock; that they also procured the election of officers and directors who acted in their interest; that thereafter, through the instigation of Moore & Schley, the corporation entered into a contract with Eicks, by which the latter agreed to convey or cause to be conveyed to the defendant corporation the malting plants on which options had been secured and to furnish a working capital of \$2,070,000, in consideration of which the corporation agreed to issue to Eicks or to his order preferred stock of the par value of \$12,500,000 and common stock of the par value of \$13,740,000; that the Guaranty Trust Company paid for the malting plants purchased from Eicks and also furnished the corporation with a working capital of \$2,070,000 out of the \$9,000,000 paid by the persons signing the subscription agreement above set forth; that there remained in the hands of the trust company 5,000 shares of preferred stock and 77,400 shares of the common stock which was delivered to Moore & Schley, who appropriated it to their own use. It was this stock for which the plaintiffs sought to compel the individual defendants to account to the corporation.

It was not alleged that Eicks failed to convey to the corporation the plants which he agreed to convey, nor that such plants were not worth what the company paid for them. No attempt was made to rescind the sale of the plants to the corporation.

Held, that the complaint did not state a cause of action against the individual defendants, as, upon the facts alleged, the corporation, in whose right the plaintiffs sued, could not itself maintain the action;

HATCH and LAUGHLIN, JJ., dissented.

(PER VAN BRUNT, P. J. and INGRAHAM, J.) That the corporation had no interest in the subscription agreement which was the foundation of the cause of action which the plaintiffs had attempted to set up;

(PER INGRAHAM, J.) That no fiduciary relation existed between Moore & Schley and the corporation, which would entitle the latter to maintain the action;

(PER PATTERSON, J.) That if a wrong had been done, it was one which would be remedied only at the suit of those who signed the subscription agreement or those claiming directly under them.

APPEAL by the defendants, John W. Simpson and another, as executors, etc., of John G. Moore, deceased, and others, from an

interlocutory judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 21st day of July, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, overruling the demurrers interposed by the said defendants to the plaintiffs' complaint.

This action was brought by the plaintiffs as stockholders of the American Malting Company, a New Jersey corporation, to require the defendants, other than the American Malting Company, to account to that company for secret profits alleged to have been realized by them as promoters of the company.

The complaint in substance avers that the plaintiffs are stockholders in the defendant company, which is a corporation organized and existing under the laws of New Jersey, with its principal place of business in the city of New York; that at the time herein mentioned John G. Moore and the defendants Grant B. Schley, Elverton R. Chapman, Henry G. Timmerman and George F. Casilear were copartners engaged in business as bankers and stockbrokers in New York city under the firm name of Moore & Schley, and that the defendant Caspar H. Eicks was an employee of said firm, and that the said defendants committed the acts hereinafter set forth; that the said John G. Moore died and John W. Simpson and Thomas Thacher were duly appointed his executors, and made parties defendant in their representative capacity; that all the acts herein set forth were done in the city of New York, and all of the defendants and the plaintiff McElheny are residents of said city; that said malting company was incorporated on or about the 27th day of September, 1897, with an authorized capital of \$30,000,000, one-half of which was and still is preferred stock and the other half common stock and which is still divided into 150,000 shares of preferred stock of the par value of \$100 per share and 150,000 shares of common stock of the par value of \$100; that said defendant company was incorporated for the purpose of making for said Moore & Schley a secret profit upon certain options which they held upon other malting properties; that the attorneys who prepared the articles of incorporation of said defendant company were Messrs. Simpson, Thacher & Barnum of New York city; that the incorporators of said corporation were Hamilton H. Durand, John

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J. Treacy and Frederick Dwight, all of whom were at the times hereinafter referred to employees in the office of the firm of Simpson, Thacher & Barnum, which latter firm at all times acted as the attorneys for Moore & Schley.

That immediately prior to the incorporation of said company and in furtherance of their scheme to make a large secret profit to themselves, they procured options upon about twenty-five malting plants situate throughout the United States and caused said options to be taken in the name of one Eicks, their employee, for their benefit; that the taking of these options in the name of said Eicks was to make it appear to the public that Moore & Schley in securing the options were acting with an independent third party; that in furtherance of the scheme aforesaid, the said firm of Moore & Schley invited the public to subscribe to the capital stock of said company for the purpose of securing the cash requisite for the purchase of the said malting plants, and working capital; that as a result thereof a large number of persons signed subscriptions to take \$9,000,000 par value of the preferred stock of said corporation and \$4,500,000 par value of the common stock of said corporation, and agreed to pay therefor the sum of \$9,000,000; that the aforesaid subscriptions provided all the money necessary to procure said options and to purchase said plants and to provide said working capital, and that said Moore & Schley were not one of said subscribers; that in furtherance of said scheme the said Moore & Schley procured additional subscriptions to the capital stock of said defendant company, which at that time was about to be incorporated, from the owners of said malting plants, amounting to \$3,000,000 par value of the preferred stock and \$1,500,000 of the common stock of said corporation; that said last-mentioned subscriptions were paid for by said subscribers conveying to said defendant company the malting plants herein referred to; that the subscriptions first above mentioned, amounting to \$9,000,000 preferred and \$4,500,000 of the common stock of the defendant company, were in the form of a letter addressed to Moore & Schley, and were made by the subscribers upon the condition and agreement that all of the stock of the defendant corporation issued would be used by said Moore & Schley and their associate Eicks, for acquiring said malting plants, upon which

said firm of Moore & Schley had options, and for working capital, and for no other purposes; that the reason said subscriptions were made in the form of a letter as aforesaid, was because at that time the defendant company had not been incorporated; that as a result of all of said subscriptions, \$12,000,000 of the preferred stock and \$6,000,000 of the common stock of the defendant company were subscribed for by persons other than the defendants immediately preceding the incorporation of the defendant company, and that the stock so called for was issued previous to November 1, 1897, and the \$9,000,000 proceeds of the sale of the same as aforesaid was all that was necessary to procure the said malting plants and provide a working capital, and was all that was used by Moore & Schley therefor.

That in furtherance of said scheme Moore & Schley then immediately caused said company to be incorporated, and employed the Guaranty Trust Company of New York to take charge of the collection of said subscriptions and distributing the money so received, and distributing the stock to which said subscribers were entitled by virtue of said subscriptions; that all of said subscriptions, except those made by the owners of said malting plants, were made payable to said trust company, which company did collect and receive the money called for by said subscriptions, and did disburse said moneys and did distribute said stock as aforesaid.

That in furtherance of said scheme, said incorporators held their first meeting and elected five directors, all of whom were either employees of Moore & Schley or Simpson, Thacher & Barnum, and that the entire organization of the corporation was in the absolute control of said Moore & Schley, and Simpson, Thacher & Barnum.

That in furtherance of said scheme, the said board of directors entered into a contract with the defendant Eicks to have said malting plants conveyed to the defendant corporation and furnish a working capital of \$2,070,000, and on its part the said defendant company agreed to issue to said Eicks or his order preferred stock in the amount of \$12,500,000 par value, and common stock in the amount of \$13,740,000 par value; that at the time such contract was entered into the said Eicks merely had options upon said malting plants and had nothing to convey; that the expenses of securing said options were small, and that they were paid out of the said

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\$9,000,000 paid by the subscribers as aforesaid; that the said malting plants were conveyed directly to the defendant company, and that the defendant company in fulfillment of the contract aforesaid had issued to said Eicks 125,000 shares of the preferred and 137,400 shares of the common stock of said company.

That in furtherance of said scheme said Moore & Schley ordered the said trust company to issue the stock as aforesaid described, and the defendant Eicks placed in its possession the said 125,000 shares of preferred stock and the 137,400 shares of common stock, which had been issued by the president and treasurer of said defendant company to said Eicks as aforesaid; that said trust company carried out said instructions and disbursed said \$9,000,000 to pay for the said plants and to provide a working capital of \$2,070,000 for defendant company, and distributed to said subscribers of said stock 120,000 shares of preferred and 60,000 shares of the common stock of said defendant company; that no further or other stock was needed or used by the defendants or any one else to acquire said options, malting plants and the working capital, and there remained in the possession of the said trust company 5,000 shares of the preferred stock and 77,400 shares of the common stock of said defendant company; and that as said last-mentioned shares of stock were not needed, they should have been returned to the treasury of the defendant company. Instead, however, of returning said stock to the treasury of the defendant company, the said trust company did, under the directions of said Moore & Schley and Eicks, deliver the said 5,000 shares of preferred and 77,400 shares of common stock to the said John G. Moore, and the defendants Schley, Chapman, Timmerman, Casilear and Eicks, who received the same and appropriated the same to their own use and have never paid anything therefor.

That the said defendant company has not nor have its stockholders ratified the issuance or appropriation of said last-mentioned stock, and that it was done without their knowledge or consent.

That in furtherance of said scheme said Moore & Schley caused directors to resign and they were elected in their places, and that the defendant Chapman at their instigation was elected treasurer and continued in office at a salary of \$8,000 per year.

That in furtherance of said scheme the said Moore & Schley

caused the said defendant company to pay for two years quarterly dividends of one and three-quarters per centum each upon the preferred stock of said defendant company, regardless of the fact of whether the said defendant company had made any surplus earnings; that said dividends amounted to \$1,855,000, and that the net earnings of said defendant company did not exceed during that time \$700,000; that as a result of paying said illegal dividends the preferred stock of said defendant corporation sold at public sale as high as \$88 per share and the common stock at \$38 per share; that as a result thereof, the public, believing that the defendant company was fully earning such dividends, bought large amounts of stock, including stock which said Moore & Schley had received as aforesaid, and there are now at least 1,400 stockholders in said corporation.

That as a further result the working capital was dissipated and the company did not have sufficient funds with which to pay its floating debt, a large portion of which floating debt was call loans, and as a further result the defendant company's credit became so low that new loans could not be obtained and legal proceedings threatening immediate insolvency became imminent; that as a result and to procure the necessary working capital, the defendant company was compelled to issue and did issue \$4,000,000 of first mortgage six per cent, fifteen year gold bonds at a discount of ten per cent, and a large portion of said bonds is still outstanding and is a first lien on said defendant company's property, and the selling price of the stock at public sale dropped to \$19 per share for preferred and to \$2.75 per share for common stock.

That in the year 1898 the defendant company purchased additional property for which it paid \$1,940,000 of par value of the preferred and \$750,000 of the common stock of said company, and that nearly all of said last-mentioned stock was immediately sold by its purchasers, through the said firm of Moore & Schley, to the public at large prices.

That these plaintiffs and the other stockholders did not learn of the foregoing illegal acts until late in the spring of 1901, and that as soon as they could be advised by counsel, and in August, 1901, the plaintiffs duly demanded of the defendant company and its board of directors that the defendant company institute the necessary legal proceedings against said firm of Moore & Schley to make

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them account to the defendant company for the said \$500,000 of preferred stock and \$7,740,000 of common stock of the defendant company which said Moore & Schley had retained as a secret profit as aforesaid; that the said directors and said defendant company have neglected and refused to bring said action; that the defendants Simpson and Thacher are members of the law firm of Reed, Simpson, Thacher & Barnum, who were and still are the attorneys for the defendant company.

That these plaintiffs upon behalf of themselves and all other stockholders of the defendant company similarly situated, commenced an action to compel said directors to pay back to said company the amount of illegal dividends paid out as aforesaid, which action is still pending; that the present president of the company, Charles A. Stadler, and the present secretary of the defendant company, George F. Neidlinger, and one of the present directors of the defendant company, Seymour Scott, are three of the defendants whom the plaintiffs herein have sued for illegal dividends as aforesaid; that the attorneys for all of the said seven directors sued for the illegal dividends as aforesaid, excepting Charles M. Warner, are the aforesaid firm of Reed, Simpson, Thacher & Barnum; that when the plaintiffs here made their demand upon the defendant company to begin the proceedings herein, said demands were forwarded to the said firm of Reed, Simpson, Thacher & Barnum for advice, and that when the summons herein was served upon the defendant company it was forwarded to the same law firm; that the said defendant company is controlled by persons who are hostile to this action, and it would be useless to expect the defendant corporation to bring this action.

That prior to the commencement of this action the plaintiffs duly demanded of the defendants that they account to the American Malting Company for said \$500,000 of preferred stock and \$7,740,000 of common stock, but that the defendants have refused and still refuse to do so. The prayer of the complaint then is on behalf of the plaintiffs and all other stockholders similarly situated:

First. That the defendants be ordered, directed and compelled to account to the defendant American Malting Company for each and all of said \$500,000 of preferred stock and \$7,740,000 of com-

mon stock retained by them as a secret profit as aforesaid, and any other stock or money retained by them as a secret profit.

Second. That the defendants be ordered, directed and compelled to account to the defendant corporation for all of said stock issued at or about the time of its organization, namely, \$12,500,000 of preferred stock, and \$13,740,000 of common stock, and \$9,000,000 of money paid by the subscribers to the stock of the defendant corporation.

Third. That a referee be appointed with power to state an account of the amount of said stock and money that the defendants have received and for what they have received them, the amount of said stock that they still have, the amount of said stock that they have sold and the prices received therefor, and the price at which the stock of said defendant company has been sold, both by the company and at public sale, and the market value of the stock of said defendant company at such a time after the incorporation of said defendant company as the market value can be determined.

Fourth. That the defendants be ordered, directed and compelled to pay to the plaintiffs the costs and disbursements of this action.

Fifth. That the plaintiffs have such other and further relief as to the court may seem just in the premises.

To this complaint the defendants separately demurred upon the ground that it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action, and from the order overruling said demurrer this appeal is taken.

The stock subscription referred to in the complaint and made a part thereof is as follows:

“Messrs. MOORE & SCHLEY:

“GENTLEMEN.—Each of the undersigned agrees to take the number of shares set opposite his signature hereto of the preferred stock and one-half that number of shares of the common stock of a company to be organized to manufacture and deal in malt with a capital of \$30,000,000, one-half thereof 7% cumulative preferred stock and the remainder common stock, and to pay therefor the amount likewise set opposite his signature to the Guaranty Trust Company of New York, at its office in New York City, as and when called for by said trust Company.

“It is expected that of the capital aforesaid all but two and one-

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half millions of preferred and one and one-quarter million dollars of common stock to be reserved in the treasury for further corporate uses, will be issued in acquiring certain malt properties on which you and your associates control options (or other value as you may determine in lieu of any thereof that may not be acquired) and for working capital and that a part of the stock so to be issued, to wit: nine million dollars of preferred and four and one-half million dollars of common heretofore underwritten, will be sold upon the terms above stated, deliverable when and if issued.

"Dated New York, September 27th, 1897."

Signatures.	No. of Shares of Preferred Stock.	Prices.

Thomas Thacher, for the appellants.

William M. Bennett, for the respondents.

VAN BRUNT, P. J.:

This action was brought by certain stockholders of the defendant company in the interest of the company to recover from the firm of Moore & Schley what is termed in the complaint "a secret profit" made "at the expense of the defendant company, its stockholders and creditors."

It seems to me that the fundamental error which underlies the whole of this complaint is the assumption that the defendant company had any interest in, or acquired any rights by, the contract, Exhibit A, annexed to the complaint, and which is erroneously styled a "stock subscription."

This paper was simply a contract between the signers thereof and Moore & Schley, whereby the signers agreed to buy from Moore & Schley the number of shares set opposite their respective names, at a price specified, of a company to be organized upon the basis therein provided; and Moore & Schley agreed to sell certain of said shares to the signers at the price named, deliverable when and if issued.

It seems to me reasonably clear that if the signers had failed to receive the stock subscribed for when issued, they would have had no cause of action against the defendant company, their only

recourse being against Moore & Schley; and if any of the signers had failed to make payments as agreed in the contract, the defendant company would have had no cause of action, Moore & Schley being the only parties aggrieved. In other words, there was no contract between the signers of that paper and the defendant company.

There is no claim but that the company was organized as required by the contract, nor that the expectations referred to therein were not carried out to the letter. All the malt properties referred to therein were acquired by the defendant company and ample working capital was provided. Moore & Schley made no secret of their interest in the properties which were to be acquired by the company. The contract expressly declared that Moore & Schley and their associates controlled the properties which were to be acquired by the company; and the only inference to be drawn from its language is that all the stock of the company, except the amount reserved in the treasury for further corporate uses, was to be issued to Moore & Schley and their associates in payment for the properties acquired and to provide working capital. All the stock, referred to in the contract as to be issued for acquiring property and working capital, was issued to Moore & Schley as contemplated for the properties therein referred to and for working capital. I say issued to Moore & Schley, because I treat Moore & Schley and Eicks as one for the purposes of this opinion. There is no claim but that Moore & Schley caused every piece of property contemplated to be conveyed to the company and provided an ample working capital.

It is said that Moore & Schley did not themselves convey the properties to the company, but that they were conveyed by the respective owners. The contract states that Moore & Schley and their associates held options upon this property. They, therefore, controlled it; and the fact that they caused the owners of the property to convey directly to the company in fulfillment of their contract with the company to convey or *procure* to be conveyed this property to the company in no manner affected their relations to the transaction. The language of the contract of Eicks with the company clearly contemplated that Moore & Schley and Eicks were not themselves to give the title. Eicks contracted to convey or *procure* to be conveyed. If one man holds a contract for the sale of real estate by another, which he assigns to a third party

it certainly is not an unusual transaction for the seller to convey directly to the assignee of the contract. There was, therefore, nothing unusual in the fact that the owners of this property conveyed directly to the company. Moore & Schley, as far as the company was concerned, were the sellers of this property as it appeared upon the face of the contract that it was contemplated that they should be; and there is no hint or allegation throughout the complaint but that the company received full value for the stock it issued. The whole foundation of the complaint resting upon the contract (Exhibit A) in which the defendant company never had any interest, no cause of action is set out.

The demurrer should be sustained.

INGRAHAM, J., concurred; HATCH and LAUGHLIN, JJ., dissented.

INGRAHAM, J. (concurring):

The cause of action sought to be enforced is one in favor of the corporation, the American Malting Company, to compel the individual defendants to account to that corporation for 5,000 shares of the preferred stock, and 77,400 shares of the common stock received by them and any other stock or money retained by them as a profit. There is no wrong done to the plaintiffs either individually or as stockholders by any of the defendants for which redress is asked, and the action must be treated as if the corporation were the plaintiff, and to sustain it the complaint must allege facts which give the corporation a right to call the defendants to account.

The complaint contains many allegations as to the intent of the defendants and the purposes and objects that they had in view; but I suppose that the liability of the defendants must depend upon what they did, not upon what they proposed or intended to do; and if what it is alleged they did, gives to the corporation no right of action, this judgment cannot be sustained. The fact that the defendants or some of them endeavored to make it appear to the public, to the stockholders of the defendant company, and to the defendant company, that the defendant company was dealing with an independent party is not at all material, unless the endeavor was successful, and neither the public nor the stockholders are before the court asking for relief.

The complaint alleges that the American Malting Company was

incorporated under the laws of the State of New Jersey on September 27, 1897, with an authorized capital of 300,000 shares of the par value of \$100 each, of which 150,000 shares were preferred stock and 150,000 shares were common stock, for the purpose, as alleged in the complaint, of making for the defendants composing the copartnership of Moore & Schley a secret profit from the purchase at or about the time of the incorporation of said defendant company of certain malting plants. The incorporators were three in number, all of whom were the employees of the attorneys of Moore & Schley, who drew the articles of incorporation and acted as employees and representatives of and at the request and instigation of Moore & Schley. Prior to the incorporation of the defendant company Moore & Schley had secured options to purchase about twenty-five malting plants situate throughout the United States, and caused such options to be taken in the name of the defendant Eicks, their employee, for their benefit. Immediately prior to the incorporation of the defendant company Moore & Schley invited the public to subscribe to the stock of the corporation, and a large number of persons signed subscriptions to take preferred stock of the par value of \$9,000,000 and common stock of the par value of \$4,500,000, and agreed to pay therefor \$9,000,000, one-half of said sum on September 28, 1897, and the balance on October 1, 1897, said subscriptions to be paid to the Guaranty Trust Company. The subscription was in the form of a letter to Moore & Schley, a copy of which is annexed to the complaint. This letter speaks for itself and shows that the allegations of the complaint as to its contents are inaccurate and misleading.

The defendant corporation having been incorporated on the 27th of September, 1897, the incorporators met on September twenty-eighth and elected five directors, who were employees of the attorneys for Moore & Schley, or representatives of Moore & Schley, and said directors elected officers, one of whom was one of the attorneys of Moore & Schley and the others employees of such attorneys. On the said twenty-eighth of September, at the instigation and request of Moore & Schley, the officers and directors caused the defendant corporation to enter into a contract with the defendant Eicks, by which Eicks agreed to convey or cause to be conveyed to the defendant corporation the said malting plants and to furnish a

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working capital of \$2,070,000, and the defendant corporation agreed to issue to Eicks or to his order preferred stock of the par value of \$12,500,000 and common stock of the par value of \$13,740,000. A copy of this contract is annexed to the complaint. The complaint further alleges that said trust company, on the joint order of the defendant Chapman, the president of the defendant corporation, and Eicks, paid for the malting plants purchased from Eicks under his contract with the corporation and paid to the corporation \$2,070,000 working capital out of the \$9,000,000 paid to Moore & Schley on the purchase of the stock; that there remained in the hands of the trust company 5,000 shares of preferred stock and 77,400 shares of the common stock of said corporation which should have been returned to the treasury of the defendant corporation, and that this said stock, instead of being delivered to the company, was delivered to the individual defendants, who appropriated it to their own use and have not accounted for it to the corporation.

These are the substantial allegations of the complaint as to the organization of the defendant corporation and the issue of the stock. The allegations of the motives and intent of the defendants (which are not alleged to have been carried out) and of other transactions of the corporation do not appear to me to be material in determining the legal relation that existed between Moore & Schley and the corporation. It is not alleged but that Eicks complied with his contract and conveyed or caused to be conveyed to the defendant corporation the malt producing plants therein specified, nor is there any allegation that the plants acquired by the defendant company were not worth what the company paid for them. The corporation was organized to acquire and work these plants. It acquired such plants, issuing therefor a part of its capital stock at a price which, so far as appears, was not excessive. It does not ask to set aside the transaction, but holds on to what it acquired in consideration of the issue of its stock. It is not alleged that there was any secret about the relation in which Moore & Schley stood to the company or to the property purchased by the company. The incorporators, the directors, the officers and Eicks, who made the contracts, and the purchasers of the stock from Moore & Schley had, so far as appears, knowledge of all the facts that are alleged in the complaint. The contract between the corporation and Eicks was

completed. The company have the title to and are in possession of all the property that it was incorporated to acquire and which it had purchased by the issue of its capital stock, and Eicks or Moore & Schley or their assignees were in possession of the stock issued for that property. Leaving out of view for a moment the sale of stock by Moore & Schley under what is called the subscription agreement, upon the completion of the contract between the company and Eicks, Eicks having performed his contract by conveying or causing to be conveyed to the corporation a good title to these malting properties furnishing an adequate working capital, and as a consideration therefor having received from the company this stock which the company had agreed to issue to him for the plants and working capital, is it not perfectly clear that the company could not recover any portion of the stock that it had issued to Eicks as the consideration for a good title to the malting plants and for supplying the working capital irrespective of the amount that Eicks had been required to pay for the acquisition of the plants or assuring the corporation a good title thereto? Neither Moore & Schley nor Eicks was an agent of the company authorized by it to purchase these plants. Neither of them were officers or directors of the company. The relation which they bore to the company was that of independent contractors agreeing to convey or cause to be conveyed to the company certain property for which the company agreed to issue certain shares of stock. To say that Moore & Schley were in fact the company and that its incorporators, officers and directors were named by them and acted at their instigation does not change the situation, for then Moore & Schley were dealing with themselves, and as they owned all the stock after it was issued, no one was injured or deceived. It is alleged, however, that Moore & Schley had made a contract to sell a part of the defendants' stock that was to be issued to Eicks, as a consideration, for his securing to the defendant corporation the title to these malting properties and a working capital, for an amount which enabled them to make the payments necessary to vest the malting properties in the defendants and furnish the working capital required, so that they could retain a portion of the stock as the profits of the transaction; and that gave the corporation a right of action which it would not have had but for that sale. The corporation was

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incorporated on September 28, 1897, and on September 29th the contract was made with Eicks. There is no allegation in the complaint when the agreement with Moore & Schley for the purchase of the stock was actually signed, but it was dated September twenty-seventh, the day before the company was incorporated, and two days before the contract for the purchase of the property was executed. It certainly cannot be assumed that this contract for the sale of stock for \$9,000,000 was obtained upon the date of the letter; and it could not have been obtained before. The subscription or, more properly, the agreement to purchase the stock from Moore & Schley, was in form a letter to Moore & Schley. By it each subscriber agreed to take the number of shares set opposite his name, in a corporation to be organized to manufacture and deal in malt, with a capital of \$30,000,000, and to pay therefor the amount likewise set opposite his signature to the Guaranty Trust Company of New York, as and when called for by the said trust company. It was stated in the letter that, of the capital stock of the company, all but \$2,500,000 of the preferred and \$1,250,000 of the common stock, to be reserved in the treasury, was to be issued in acquiring certain malt properties on which Moore & Schley, or their associates, controlled options, and for working capital; and that a part of the stock so to be issued, to wit, \$9,000,000 of preferred and \$4,500,000 of common stock, heretofore underwritten, would be *sold* upon the terms stated, deliverable when and if issued.

After deducting the stock to be retained by the company, it was stated that the amount that was to be issued in acquiring the properties and for working capital was of the par value of \$26,250,000. The stock to be issued to Eicks for the properties to be acquired for the corporation was of the par value of \$26,240,000 — less than stated in the letter. What was there then in this subscription letter to Moore & Schley which could give the corporation a right of action against Moore & Schley? Moore & Schley did not purport to be acting for the corporation to be organized, nor for those who were to become the purchasers of the stock; nor was it anywhere alleged that the agreement to purchase the stock was with the corporation. The promise to purchase was based upon the statement that the stock was to be issued in acquiring the malt properties upon which Moore & Schley controlled options, and the sub-

scribers agreed to purchase that stock from Moore & Schley. The stock which was to be purchased was stock that was to be issued for the purchase of the malt properties, and the subscribers obtained just what the letter to Moore & Schley stated they would receive, a portion of the stock that had been issued to acquire these malt properties. When the purchasers of the stock had received the stock that they had purchased they became stockholders in a corporation that had been organized to acquire certain malt properties, for which the corporation had issued its capital stock of the par value of \$26,240,000, and this is just what the agreement said they were to receive. Certainly the purchase from Moore & Schley of a portion of this stock issued by the corporation to acquire the malt properties could give the corporation no cause of action against Moore & Schley, or their associates or representatives. But Moore & Schley are called promoters, and it is claimed that because they are promoters they become in some way liable to the corporation. I do not suppose that calling them promoters itself imposes any liability. It is the relation that in fact existed between the persons upon whom a liability is sought to be imposed and the corporation in whom vests the cause of action which is sought to be enforced that must determine the question as to the liability of the defendants. If, as between the corporation and the individual defendants, a fiduciary relation is established, then of course there is imposed upon the agent or trustee the obligations that follow from that relation, but to establish that liability the relation must be shown to exist, and there is, as I look at it, no allegation in this complaint that shows that such a relation as between Moore & Schley and the corporation existed. The corporation was organized to acquire these malting properties. It acquired them by issuing its stock to Eicks, and Moore & Schley entered into a contract to sell the stock when issued. Whether Moore & Schley and those associated with them made or lost money would be entirely immaterial, so far as the rights or obligations of the company were affected. If, by reason of financial disturbances, the subscription to the stock had not been successful, or the subscribers had failed to pay for the stock subscribed for, and the transaction had resulted in a loss, it would not, I assume, be claimed that Moore & Schley could have called on the corporation to make good the loss.

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I have not, in expressing my views upon this question, referred to the many cases which were cited on the argument before us. They were all based upon a relation of trust that was shown to exist between the promoter and the corporation, or those who subscribed to the capital stock of the corporation. *Brewster v. Hatch* (122 N. Y. 349) is an illustration of the cases in which the relation was established, but in that case it was the subscribers to or purchasers of the stock that sought to hold the persons from whom the stock was purchased as their trustees, not as trustees for the corporation. The plaintiffs were subscribers to the stock of a corporation, and asked for the damages sustained by them on the purchase of the stock. The court, in reversing a judgment in favor of the defendants said: "The end which Brown and his associates sought to and did accomplish, as stated in their testimony, and as found by the court, was the acquisition of the mining property by the corporation to be organized wholly at the cost of such persons as should subscribe and pay for shares to be issued at the rate fixed, and to retain for themselves a majority of the stock without expense or risk. They testified and the court found that their purpose was not disclosed to the plaintiffs. The question is, was the relation between these litigants (the purchasers and sellers of the stock) simply that of vendors and vendees of shares to be issued, or was it one of trust and confidence binding the defendants to the exercise of good faith and to disclose such information as they possessed affecting the value of the property in which the plaintiffs were induced to purchase an interest?" The prospectus upon which the subscriptions were based stated that the defendants were the trustees who would manage its affairs and receive the subscriptions for stock, and clearly indicated that the defendants as trustees were to control and direct such proceedings as should be taken anterior to the formation of the corporation as well as after it; and it was held that the plaintiffs were led to believe and had a right to believe that the defendants were acting in the interest of all the investors and occupied before the organization of the corporation a position of trust and confidence towards those whom they induced to invest in the enterprise and that they were liable for the damages sustained by the plaintiffs who were induced to invest in the shares that were issued.

If the purchasers of the stock of the defendant company had suf-

ferred damage by reason of a breach of a trust obligation which existed as between them and the individual defendants, that they would have a cause of action against the defendants cannot be doubted; but that is not this case. The plaintiffs were not subscribers to the stock of the corporation, but purchased it long after it had been issued for property purchased by the corporation. It does not even appear that the stock that they held was a portion of the stock sold by Moore & Schley under the agreement before mentioned. Nor is the cause of action based on a relation of trust between the plaintiffs and the individual defendants. It is the right of the corporation that is sought to be enforced, and the plaintiffs must establish that there was such a relation between the corporation and the individual defendants and that the defendants violated their duty to the corporation to entitle the plaintiffs to succeed in this action. No subscriber to this stock has complained of any deception or violation of confidence. The corporation got what it bargained for. All connected with it knew of all the facts alleged in the complaint, and neither the corporation nor the subscribers have sought to rescind the transaction.

It is, however, thought that if what is known as the English rule is to be adopted in this State, there is imposed some liability on the defendant. But an examination of the cases in which that rule has been applied discloses that they are but an application of familiar principles, always a part of the common law. Thus the case of *Erlanger v. New Sombrero Phosphate Co.* (3 App. Cas. 1218) was brought to rescind a contract of sale made by the promoters to the corporation. The facts undoubtedly justified the rescission, and it was held in affirming a judgment rescinding the sale to the corporation that the application to make the promoters account for the profits that they had made by the sale to the company could not be granted; that all the relief that a court of equity could grant was a rescission of the sale. The corporation in that case was organized by the owner of the property which was to be sold to the corporation. The public subscribed to the corporation for its stock and the proceeds of such subscription were paid to the company, its stock was issued, and such proceeds were paid by the company to the promoters for the property transferred to it. The relations between the corporation and the promoters were entirely different in that case from what they are in

this. In this case the stock was actually issued by the company to Eicks for the property, and the stock was sold by him to others.

In *Cavendish Bentinck v. Fenn* (12 App. Cas. 652) the defendant, a director of the Cape Breton Company, was sought to be held liable for a breach of trust as a director of the company. Upon appeal to the House of Lords from a judgment for the defendant it was held that, as the defendant was interested in the property sold to the corporation, he, being a director, was bound to disclose that interest to the other directors of the company who were entering into a contract for the purchase of property, and his failure to make that disclosure would entitle the company, upon discovering his interest, to rescind the sale, but at the time the action was brought such a rescission had become impossible, and thereupon it was claimed that the defendant had to make good to the company the loss that they had sustained owing to his misfeasance in failing to make that disclosure. In affirming that judgment Lord HERSCHELL, in the House of Lords, said: "Now I am by no means prepared to say that the argument of the appellant is well founded that such a case as this is a parallel case to the class of cases to which I have alluded, where an agent employed to go into the market and buy at the market price sells his own goods to the company at something above the market price. But I do not think it necessary to come to any absolute determination upon that point, because it is of the very essence of such a case as this to show that the price at which the property was sold to the company was in excess of what has been called the real price or the true value." And it was held that, in the absence of evidence to show that the price at which the property was sold to the company was in excess of its true value, there was no such cause of action. And the opinion continues: "I think it is impossible to arrive at any such conclusion, and to say that, therefore, there has been misfeasance on the part of Mr. Fenn, the present respondent, which would warrant your lordships coming to the conclusion that he should be compelled to return a part of the money received in respect of this purchase on the ground that he was making improperly a considerable profit. * * * There is no misfeasance in a person who has an interest in the property, by being a shareholder in the company which is selling it, never-

theless acting as a director in the purchase of that property for another company. The misfeasance, if it exists at all, must be in this, that he enters into such a transaction without communicating to his codirectors the fact that he has such an interest. It seems to me that it must rest with those who allege the misfeasance to prove that element, which is an essential element to make out misfeasance at all."

Gluckstein v. Barnes (App. Cas. [1900] 240) was a case of fraudulent misrepresentation by Gluckstein and three other persons as to the price that they had paid for the property which they had sold to the company of which they were directors, and the lord chancellor in stating the question says: "The simple question is whether four persons, of whom the appellant is one, can be permitted to retain the sums which they have obtained from the company of which they were directors by the fraudulent pretence that they had paid 20,000*l.* more than in truth they had paid for property which they, as a syndicate, had bought by subscription among themselves, and then sold to themselves as directors of the company." It was determined that fraud was proved and that said persons were liable to the company for the damage sustained by the company by reason of the fraud. In that case it was said: "Indeed, the case is so clear that I do not think it is a case of inadequate disclosure, but of direct misrepresentation."

In *Burland v. Earle* (App. Cas. [1902] 83), a case before the Privy Council, in speaking of an action brought by one stockholder to enforce a demand in favor of the corporation in which he owned stock, it is said: "The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company." In that case it appeared that at a public sale Burland, one of the directors of the company, had purchased property for \$21,564; that he shortly afterwards sold the property to the company for \$60,000; that under these circumstances he had been ordered to pay to the company the difference between the purchase price and the price at which he sold it to the company; and in discussing that question, Lord DAVEY said: "Both courts have held that the resale was by Burland's advice and influence, and was made without disclosing to the company the price at which he had pur-

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chased. It was also held in the Court of Appeal that Burland had bought the property with the intention and for the purpose of reselling it to the company. * * * But their Lordships do not think it necessary to pursue these topics, because they are of opinion that the relief prayed by the amended statement of claim, and granted in the courts below, is altogether misconceived. There is no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee for the company of the purchased property. It may be that he had an intention in his own mind to resell it to the company; but it was an intention which he was at liberty to carry out or abandon at his own will. It may be also that a person of a more refined self-respect and a more generous regard for the company, of which he was president, would have been disposed to give the company the benefit of his purchase. But their Lordships have not to decide questions of that character. The sole question is whether he was under any legal obligation to do so. Let it be assumed that the company or the dissentient shareholders might by appropriate proceedings have at one time obtained a decree for rescission of the contract. But that is not the relief which they ask or could in the circumstances obtain in this suit. The case seems to their Lordships to be exactly that put by Lord CAIRNS in *Erlanger v. New Sombrero Phosphate Co.*" And Lord CAIRNS is quoted as follows: "It may well be that the prevailing idea in their mind was not to retain or work the island, but to sell it again at an increase of price, and very possibly to promote or get up a company to purchase the island from them; but they were, as it seems to me, after their purchase was made, perfectly free to do with the island whatever they liked; to use it as they liked, and to sell it how and to whom and for what price they liked. The part of the case of the respondents which as an alternative sought to make the appellants account for the profit which they made on the resale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871, is not, as I think, capable of being supported."

The principle laid down in these cases does not, it seems to me, support this action. There were no representations in the Moore &

Schley letter that the persons who agreed to take this stock were purchasing it from the company. What they agreed to do was, to purchase the stock from Moore & Schley and to pay to the trust company as agents of Moore & Schley the price which they agreed to pay for the stock. The further provisions of this agreement clearly show the nature of the undertaking and the obligations assumed by the subscribers. The corporation was to have a capital of \$30,000,000, and the agreement stated that "it is expected that of the capital aforesaid all but two and one-half millions of preferred and one and one-quarter million dollars of common stock to be reserved in the treasury for further corporate uses, will be issued in acquiring certain malt properties on which you (Moore & Schley) and your associates control options * * * and for working capital and that a part of the stock so to be issued, to wit: nine million dollars of preferred and four and one-half million dollars of common heretofore underwritten, will be sold upon the terms above stated, deliverable when and if issued." The whole agreement shows that this was a sale of stock by Moore & Schley, which was to be acquired by them after its issue by the corporation for the purchase of these malting properties upon which Moore & Schley had options. It clearly contemplated that before the stock was to be delivered under this agreement, the company should be organized, the stock issued and acquired by Moore & Schley, and delivered by them to the signers of this agreement. The signers of the agreement made no contract with the company, and there is here nothing that gives to the corporation the right to compel Moore & Schley to accept less for their options and the property that they secured for the corporation under the options than the corporation had agreed to pay for the properties. Nor have the corporation, or its stockholders, or the purchasers of the stock asked to rescind the purchase. This suit is in effect one to compel the vendors (Moore & Schley) to return a part of the consideration that the corporation had paid for these properties which it had purchased, upon the ground that the vendors made a profit out of their contract with the corporation — a claim which, in all the English cases to which I have called attention, it had been held could not be enforced. If we assume that the persons purchasing stock of Moore & Schley under this agreement would have had a right of rescission

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or a right of action against Moore & Schley to recover the damages sustained by them because of any false representation as to their relations to the property or to the company, that would give no cause of action to the company, nor would a settlement with the company by Moore & Schley have satisfied any cause of action which had existed in the subscribers to this agreement either to rescind their purchase of the stock or to claim from Moore & Schley any damage that they had sustained by its purchase. It is the subscribers to this agreement who would be injured by any misrepresentations or suppressions contained in the instrument. They would have their cause of action against Moore & Schley; and to hold Moore & Schley also liable to the company would be to impose an obligation upon them for statements made, not to the company, or for the purpose of inducing, or which did induce any corporate action, but made to subscribers to an agreement to purchase stock of the company. The liability to the corporation must depend upon the violation of a trust relation in which Moore & Schley stood to it. As was said by the Court of Appeals in *Seymour v. S. F. C. Assn.* (144 N. Y. 333): "But in every class of cases the rule is founded upon the unwillingness of the law to uphold contracts which bring into collision the trust duty and the personal interest. * * * The entire basis of the rule consists in this collision between trust duty and personal interest, and the equitable prohibition has no application where there is no such possible inconsistency." I think this distinction is recognized in all the authorities: *Parsons v. Hayes* (50 N. Y. Super. Ct. 29); *Home Fire Ins. Co. v. Barber* (60 L. R. A. 927); *Tompkins v. Sperry, Jones & Co.* (96 Md. 560). As before stated, neither the corporation nor the subscribers to this agreement has at any time offered to rescind the transaction, nor is this suit brought to enforce a right of rescission, and I do not think that there are any facts alleged which show a violation by these individual defendants of any duty reposing in trust and confidence to the corporation that they have violated which authorizes the corporation to call upon them to account for their acts.

It follows, therefore, that the judgment must be reversed, with costs, and the demurrer sustained, with costs, with leave to the plaintiffs to amend on payment of costs in this court and in the court below.

PATTERSON, J. (concurring):

I am unable to concur in the opinion of Mr. Justice HATCH, and my judgment in this case inclines me to concur in the result reached by Mr. Justice INGRAHAM.

It seems to me that the radical defect in the plaintiffs' case is that they do not show themselves to be entitled either originally or derivatively to the relief they demand. Taking the allegations of the complaint reciting facts, and separating them from mere characterizations and conclusions, it seems to me to be apparent that there can be no cause of action inhering in the plaintiffs, unless one inhered in the corporation. I do not see how a right to maintain this action resided in the corporation. Suggestions, charges, epithets and imputations in the complaint must all yield, as I view the case, to the contents of Exhibit A (annexed to the complaint), which only constitutes between the signatories to that paper and Moore & Schley a private contract that the former would take the number of shares set opposite to their several signatures of preferred stock and of common stock in a corporation to be organized to manufacture and deal in malt with a capital of \$30,000,000, out of which capital all but \$2,500,000 of preferred and \$1,250,000 of common stock, to be reserved for future corporate uses, would be applied to acquiring malt properties of which Moore & Schley controlled options (or their value as Moore & Schley might determine in lieu of any thereof that might not be acquired), and that the stock so to be issued, namely, \$9,000,000 of preferred and \$4,250,000 of common stock, would be sold upon the terms above stated, deliverable when issued. What would be understood by this private contract entered into between Moore & Schley and those who signed it? As soon as it was put out by Moore & Schley, and they invited responses, those who signed the paper knew precisely what they undertook in the way of an obligation. When they signed, they did not agree with a corporation, but they agreed to take from Moore & Schley, when a corporation should be formed, the number of shares set opposite their names respectively, and they agreed as to what and how much stock should be issued for the options. It seems to me that this is a simple contract by which Moore & Schley agreed to furnish shares of stock in respect of which those agreeing to take knew fully what the capitalization was to be and what would be

paid in stock to get in the malt properties, which could be acquired only through the options which were held or controlled by Moore & Schley. There is no false representation and there is no suppression of fact. It is a mere characterization to say that Moore & Schley made an unlawful secret profit out of a situation which it is not shown they were bound to disclose to the signers of Exhibit A.

I fully concur with Mr. Justice HATCH in the abstract rules of law which he has stated, and in the very admirable and learned classification and array he has made of the cases bearing upon the subject of the liability of a promoter of a corporation. I see no reason to dissent from anything he has said on that general matter, and I regard his opinion in that respect as a very useful and valuable contribution to the literature of that subject. But I cannot bring this case within any one of his classifications. My view is that the corporation which was organized had no right of action against Moore & Schley, and that hence these plaintiffs, as stockholders, derive no right of action from that company. If a wrong has been done, it is one to be remedied in favor of those who signed Exhibit A, or those claiming directly under them, and there is no complaint emanating from them. For these reasons, I think the demurrer should have been sustained, and, as a consequence, I concur in the conclusion reached by Mr. Justice INGRAHAM.

HATCH, J. (dissenting):

The complaint states a single and indivisible cause of action. The disposition which this court made of the motion to strike out certain parts of the complaint and to make other averments more definite and certain has settled as to form and materiality the averment of matter contained therein. While no opinion was written in making disposition of that appeal (77 App. Div. 642), yet such is the necessary effect of that determination. The cause of action averred in this complaint, stripped of all verbiage, is plain and simple. It charges that Moore & Schley for the purpose of obtaining for themselves a secret profit, did certain things and thereby obtained profits to which they were not entitled. The acts which Moore & Schley are charged with doing to effect this result consisted in procuring in the name of the defendant Eicks, who was their agent for the purpose, options for the purchase of about twenty-five

malting plants, located in various States and cities of the United States. As no corporation was at this time in existence to take over these properties, Moore & Schley, for the purpose of procuring funds with which to make a purchase of the several plants upon which their agent held options, procured to be addressed to themselves a letter from proposed subscribers to the capital stock of a corporation thereafter to be formed by Moore & Schley. Among other things, this letter provided for subscriptions to the capital stock of a company to be organized with a capital of \$30,000,000, one-half seven per cent cumulative preferred stock and the remainder common stock. The condition of the subscription was that all of the stock issued upon the organization of the company was to be used for the purpose of acquiring from the vendors the malting properties upon which Eicks, as agent, held options, and to provide a working capital. The condition was expressed in these words: "It is expected that of the capital aforesaid, all but two and one-half millions of preferred and one and one-quarter million dollars of common stock to be reserved in the treasury for further corporate uses, will be issued in acquiring certain malt properties on which you and your associates control options * * * and for working capital and that a part of the stock so to be issued, to wit: nine million dollars of preferred and four and one-half million dollars of common heretofore underwritten, will be sold upon the terms above stated 'deliverable when and if issued.'" There were no associates of Moore & Schley. Eicks was not an associate, as he was their agent, acting for them and entirely subject to their control. Pursuant to the agreement contained in the letter, subscriptions to the capital stock were made, and by their terms were payable to the Guaranty Trust Company, which was an agency selected by Moore & Schley. In addition to these subscriptions, the vendors of the malting plants subscribed to \$3,000,000 of preferred and \$1,500,000 of common stock. Having been assured of sufficient moneys by the subscriptions to carry out the scheme, Moore & Schley proceeded to the organization of the corporation, selecting directors therefor entirely under their control. Simultaneously with the organization of the corporation they directed the trust company to call in the amount of the subscriptions, and obtained from such calls \$9,000,000, which the subscribers paid to the trust company. This sum was

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sufficient to pay for all the properties transferred and furnish the working capital of \$2,070,000. This being accomplished, Moore & Schley caused the directors to enter into a contract with Eicks for the transfer of the malting plants to the corporation, and pursuant thereto the several properties were conveyed directly to the corporation without the intervention of any third party. The stock was thereupon issued to Eicks, who delivered it to the trust company, and it allotted the shares of stock to the corporation and individuals entitled thereto. After the allotment had been made, there remained with the trust company \$500,000 of preferred stock and \$7,740,000 of common stock, which was not required or used in procuring the plants or furnishing the working capital. This stock, it is averred in the complaint, was the property of the corporation. Moore & Schley, without disclosing these facts to the subscribers or to the company, and not being subscribers to the shares of stock of the company, nor having invested any money in the enterprise in any form, directed the trust company to deliver to them the last above-mentioned shares of stock, and they appropriated the same to their own use, without paying anything therefor and have never accounted for the same to the corporation or to any other person on its behalf.

It is evident that Moore & Schley from the inception of the enterprise and in all of the steps taken to the distribution of the stock stood in relation thereto as promoters. While it is true that they were owners of the options it is equally true that they procured those options for the purpose of transferring them to a corporation, to be thereafter formed, and in the entire transaction they intended to and did make use, not of their own money, but of money paid in by the subscribers, which in amount was sufficient to pay the purchase price of the property and furnish the working capital. The excess of stock was provided for the purpose of being appropriated by Moore & Schley, and the complaint avers that in accomplishing it the scheme took this form. It is evident, therefore, that Moore & Schley in relation thereto were promoters. Cook on the Law of Stock and Stockholders defines a promoter to be: "A person who brings about the incorporation and organization of a corporation. He brings together the persons who are interested in the enterprise, aids in procuring subscriptions, and, generally, is the representative of parties who wish to sell property to the corporation or to construct

its works." (§ 651.) This definition is approved in *Dickerman v. Northern Trust Co.* (176 U. S. 181, 203). In *Brewster v. Hatch* (122 N. Y. 349), where the persons devising and carrying out the scheme were held to be promoters, it was said by Chief Judge FOLLETT : "The end which Brown and his associates sought to and did accomplish, as stated in their testimony, and as found by the court, was the acquisition of the mining property by the corporation to be organized wholly at the cost of such persons as should subscribe and pay for shares to be issued at the rate fixed, and to retain for themselves a majority of the stock without expense or risk." The scheme in the present case was quite similar, as the averred purpose of Moore & Schley was to procure the subscriptions and obtain the money therefrom to pay for the properties for the corporation and appropriate the stock without providing any funds for the enterprise or running any risk in the venture, and this they have succeeded in doing. They are, therefore, literally promoters of the transfer of the property and of the organization of the company. Of such relation it has been said : "A promoter is considered in law as occupying a fiduciary relation towards the corporation. He is an agent of the corporation and his compensation is derived from it or from the persons who are the principal stockholders of the corporation. The promoter is not allowed to receive and retain a secret profit given to him by the parties with whom the corporation contracts. Frequently the promoter himself owns or has an interest in the property which is sold to the corporation. In such cases if he openly acknowledges such interest and deals with the company at arm's length the transaction is allowed to stand. But if the promoter conceals his interest in the property sold to the corporation the sale may be set aside, the property returned and the money recovered back." (Cook Stock & Stockh. § 651, and cases cited.) This rule of law has received approval in *Dickerman v. Northern Trust Co.* (*supra*) and in many other cases. (*Brewster v. Hatch*, *supra*; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218; *Gluckstein v. Barnes*, App. Cas. [1900] 240; *Colton Improvement Co. v. Richter*, 26 Misc. Rep. 26; *Hayward v. Leeson*, 176 Mass. 310.) If we are right in our conclusion that the averments of this complaint show that Moore & Schley were promoters of the corporation for the purpose of making this secret profit at the expense of the subscribers and the

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corporation, without making disclosure of the same, then it would seem to follow that they are liable to account for the property or its proceeds at the instance of the party who has suffered by the act.

It is averred in the complaint that the stock appropriated by Moore & Schley was the property of the corporation and was required to be placed in its treasury, and that, therefore, it being its property, a wrong has been done to it, and that it has been damaged to the extent of the value of the stock so appropriated. It seems clear that after the corporation was formed, the stock, which was issued, was and continued to remain its stock until transferred for some purpose of corporate use, and that no one could appropriate it to himself without giving value therefor. Certainly the board of directors were not authorized to make a gift of it to any person. Moore & Schley had no more authority to appropriate the stock to their use without giving value therefor than would the board of directors be authorized to make a gift of it. Taking the stock from the corporation was an appropriation of its property, and if no value was given therefor it operated to deplete the property of the corporation or to create an obligation against it, and in law it constitutes a fraud upon the corporation and its stockholders. Under similar circumstances it has been held that an action would lie either by the corporation or its representatives to compel the persons who have misappropriated the stock to account for the same, or its value, within well-settled equitable principles. (*Brewster v. Hatch, supra*; *Colton Improvement Co. v. Richter, supra*, and cases cited; *Hayward v. Leeson, supra*; *Spaulding v. North Milwaukee Town Site Co.*, 106 Wis. 481; *Pittsburg Mining Co. v. Spooner*, 74 id. 307.) The rule is the same in England. (*Erlanger v. New Sombrero Phosphate Co., supra*; *Gluckstein v. Barnes, supra*; *Matter of Lady Forrest [Murchison] Gold Mine, Ltd.*, 1 Ch. Div. [1901] 582.)

In *Burland v. Earle* (App. Cas. [1902] 83) it was held that where a director purchased property upon his own motion without any mandate from the company directing him so to do, and under such circumstances that he did not become a trustee, and subsequently sold the same property to the company at an advance in price, he could not be compelled to account for such difference by a share-

holder, and that no recovery could be had for such act; that if any wrong was done, it was a wrong done to the company, and it was the party to sue to redress the wrong. There the wrong would be in the sale, if it fell within any prohibition. In the present case the wrong is done to the company, not in any sale, but in the appropriation of its stock without giving value therefor. To the same effect is *Cavendish Bentinck v. Fenn* (12 App. Cas. 652). Many other cases might be cited in other jurisdictions to the same effect. So far as I am aware, there has never been any denial of the jurisdiction of equity to lay hold of such a transaction and grant relief, whether it be between individuals, who have suffered, or corporations. (*Getty v. Devlin*, 54 N. Y. 403; 70 id. 504.) The fact being established, the person or corporation wronged may maintain the action, and as we have before observed, in the present case the wrong was done to the corporation for the reason that the stock was its property and was misappropriated by Moore & Schley. The present action is to be treated as one brought by the corporation and for its benefit, for by the averment of the complaint it appears that not only has a demand been made upon the corporation to bring the action and been refused but that a demand would be unavailing if one had been made and this gives the right to the plaintiffs to maintain the action. (*Flynn v. Brooklyn City R. R. Co.*, 158 N. Y. 493; *Hutchinson v. Stadler*, 85 App. Div. 424.)

It is claimed that such result does not necessarily follow for the reason that in every action brought by a stockholder to enforce a corporate right, two elements are presented which are essential to the cause of action. One, a cause of action in favor of the company against the party liable to it, and secondly, a cause of action in the stockholder's favor to compel the company to enforce such liability. The argument is that there is a variety of things, out of which arise a right in favor of the corporation which may be enforced in an action, which right, however, it is neither desirable nor beneficial to enforce, and that such determination must of necessity be left to the control of the directors, charged with the duty of management, and that before a stockholder can enforce the right of the company, it becomes incumbent upon him to establish, as a part of his cause of action, that it is such a right as it would of

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necessity be of benefit to the corporation to enforce, and in which the stockholders of the company would be advantaged in property right, or otherwise, by reason of its enforcement. It is now not essential that we pass upon this question as an abstract proposition of law. It may very well be that a contract which may be avoided by a corporation might, nevertheless, be of very great benefit to it, and which in sound business judgment ought not to be avoided but continued. It may very well be that under such circumstances a court of equity would not enforce a cause of action at the instance of the stockholder suing in the right of the company. With this question, however, we are not presently concerned. It is now only needful to determine whether the company, as such, will be benefited by enforcing its right, and whether the plaintiff has such interest as will be advantaged thereby. It is evident that if Moore & Schley have misappropriated this very considerable amount of stock, the company is benefited by its cancellation or a return of its value to its treasury. It certainly will realize what such value is, if it succeed in the action; for by so doing it will retire to that extent obligations upon which it is required to pay dividends or it will have funds in its hands with which to discharge the obligations represented by the stock. Consequently, it appears in the present case to be for the distinct advantage of the corporation to enforce the cause of action. As the retirement of the stock, or payment of its value, increases the property of the corporation, or diminishes its obligations, it is of direct benefit to the stockholders. If, therefore, we adopt the view contended for by the learned counsel for the appellant, the present situation answers his requirement and shows a cause of action in favor of the plaintiffs to enforce the cause of action of the corporation. It would seem, therefore, as if this action was properly brought, and if the averments of the complaint be established by proof Moore & Schley are bound to account to the corporation for the stock or its proceeds, and this upon principles of equity so plain that no further discussion of that subject is needed.

There can be no doubt of this rule, unless we have wholly misapplied the rules of law and made construction of the acts of Moore & Schley not justified by the actual transaction. It is earnestly insisted by the learned counsel for the appellants that our conclusion

can only be based upon such a result. His claim is that no wrong was done by Moore & Schley to the company which gives it the right to call upon them or any of the defendants to account. He construes the complaint, reaching its simplest form, as averring: "Moore & Schley caused properties and cash to be conveyed to a company organized at their instance, in which they and their representatives only were interested, receiving therefor a certain amount of stock. With less than the whole amount of stock received they procured the properties and cash to be conveyed and paid, and had left some of the stock as profits. Might they retain such profits, or were they accountable therefor to the company?" The argument then proceeds to show that the company procured all of the property under the Eicks agreement; that it knew what it was obtaining; that the only parties in interest issued all of the stock for a particular purpose; that the company was only interested in obtaining the properties for the stock which it issued and in providing the working capital; that the stock which it issued was understood by the company and all the parties in interest to be solely issued for such purpose, and that when the company obtained the properties under the agreement and the money was provided for the working capital by the stock, which is issued, and every party then in interest in the company knew the facts and nothing was secret; that it could not be wronged by the appropriation of the stock by Moore & Schley, for the reason that the company obtained all the property and money which it expected to obtain, or which it had any right to obtain, or which the parties understood it would obtain; and, consequently, no wrong was done to the company or to any one else. This, it seems to us, overlooks entirely the fact that the agreement of subscription, which was addressed by the subscribers to Moore & Schley, provided in terms that all of the stock which was issued upon the organization of the company would be used for the purpose of acquiring the malting properties and furnish a working capital. None of the subscribers to the stock, who furnished all the money and were interested in the corporation, had any notice, nor was any disclosure made to them that any excess of the issue of stock for these purposes would be appropriated by Moore & Schley. The corporation was interested in procuring the properties and obtaining its working capital with as small an issue of

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capital stock as was possible for the purpose, and Moore & Schley had no more right, in promoting the organization of this company and transferring the property to it, to appropriate to themselves the excess of the stock issued over and above what was necessary for a purpose which the subscription agreement provided, than they would have had to take an equivalent in money from the treasury of the company. True, it was not secret from them, nor was it secret to the board of directors, nor was it secret to those having control of the company, but Moore & Schley stood in such relation to the company that they were required to protect its property and interests and to act towards it with the utmost good faith, for they were making a creature which could take and hold the properties upon which they held options, and under which it could acquire title. Being vendees of the property, through their agent, every element of open dealing was required, not alone of themselves and of the board of directors, which they controlled, but to the company that was purchasing from them property, and when its obligations were taken, because it had issued an excess of stock beyond that which was necessary to accomplish the purpose of its creation, a wrong was committed against the company, because it was an appropriation of its property, for which nothing was given. Such transactions can no more be supported and upheld than could be a gross overvaluation in the purchase price of the property.

It is said, however, that the subscription agreement did not constitute a contract between the subscribers thereto and the corporation; that as it acquired no interest thereunder it has no right upon which an action can be founded, and it is, therefore, entitled to no relief. By the terms of this instrument each subscriber agrees to take shares of preferred and common stock of the corporation when and if issued. There is no agreement to take any shares from Moore & Schley at any time, nor does the agreement contemplate that any shares issued to Moore & Schley will be delivered by them to the subscribers as such. The language is that each subscriber will pay to the Guaranty Trust Company of New York the amount of his subscription to the shares of stock of a corporation to be organized when called for by the trust company. It is with the corporation that the contract is made to take the shares when it comes into existence and issues its stock. There are no words which impose

upon Moore & Schley an obligation to issue, sell or deliver to any subscriber any stock issued to them, or which may come into their possession. They are mentioned as holding options upon malt properties, and that it is expected that a certain number of shares will be issued for such properties and to secure the working capital. With that sale the subscribers had no interest, save in the amount of the purchase price. Such matter was purely between Moore & Schley and the corporation; the subscribers, it is true, approved of the proposed plan, but that did not change their relations as purchasers of the stock. When they paid in the amount of their subscriptions, if the corporation, having come into existence, refused to deliver the shares to which the subscribers were entitled, the latter, it seems to me, would have had an undoubted right to compel such delivery by action against the corporation. Under such circumstances no right of action would accrue against Moore & Schley for a failure to deliver the shares, as they did not contract to deliver any, either to the subscribers or to any one else. They were bound to pay for the properties which they sold to the corporation, but they were not required to deliver stock for such purpose. If the subscriber could compel a delivery of his shares of stock, so likewise the corporation could compel payment of the subscription, and Moore & Schley, by the terms of this agreement, had no more interest in such question than would any other vendor of property to the corporation or any other shareholder of its stock. Certainly this would be true to the extent of the money provided for a working capital. That at all times belonged to the corporation, and I take it that there can be no distinction between the amount of the subscription set aside for the working capital and for which the corporation issued its stock and that portion of the subscription which went to pay for the properties purchased. In each case the money was procured from the subscribers by virtue of the contract between such subscribers and the corporation. With such question Moore & Schley were not concerned, save as promoters of the corporation and vendors of the property which they sold. If this be the proper construction of the subscription agreement it is evident that the relation was the ordinary one of subscriber to the capital stock of a corporation. The rights in such relation are reciprocal; in the corporation to compel payment and in the subscriber to compel delivery,

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and this being the relation, it must follow that the shares of stock were the property of the corporation until paid for. When its shares were issued it was entitled to receive either money or property therefor, and if it received neither, then a right of action accrued in its favor against the persons who acquired its shares without giving value therefor. The cases relied upon by the defendants do not support their several contentions. In *Parsons v. Hayes* (14 Abb. N. C. 419) the transfer was of property to the corporation. The stock was issued by it for the property which it obtained at a gross overvaluation, but the only persons interested therein at that time were the persons who owned the property, who transferred it to the corporation and who received all of its stock. While occupying that relation neither the company nor any one connected with it could by any possibility be damaged or deceived. The transaction enabled the owners of the property to place such value upon it as they chose and represent it to be of that value in stock, which was issued. The company by this arrangement could not be damaged, nor could the individuals whose active efforts created the relation, and who were the owners of the entire stock issue. If anybody could be deceived they were the subsequent purchasers of the stock, who might pay for it upon the supposition that the property which it represented was worth the value of the stock issued. Very likely such condition operated as a misrepresentation of the value of the stock and might result in perpetrating a fraud upon vendees, but it did not damage the company, nor did the transaction give any right of action in its favor against any one. The cause of action under such circumstances would necessarily rest in deceit, and the only person damaged would be the purchaser, and so the court held that an action could not be maintained either in the name of the company or by a stockholder suing in its interest, as no wrong to it had been done. This holding is fully supported upon very satisfactory reasoning in the case of *Matter of Ambrose Lake Tin & Copper Mining Co.* (14 Ch. Div. 390). The transaction was in all respects similar to that which obtained in the *Parsons Case* (*supra*) and the several opinions delivered therein clearly point out the distinction between such a case and the one we are now considering. In that case the vice-warden, having charge

of the liquidation of the company, sought to compel an accounting by the incorporators for the profits they had made by the incorporation, and it was held that no such action would lie for the reason that the company was not damaged; although it might have been organized and probably was for the purpose of deceiving the public and the purchasers of the stock, yet that such act did no mischief to the corporation, and, therefore, it had no cause of complaint. In the recent case of *Tompkins v. Sperry, Jones & Co.* (96 Md. 560; 54 Atl. Rep. 254) the Court of Appeals of Maryland determined that a bill in equity would not lie at the instance of the receivers of a corporation for purposes of liquidation for a claimed injury done to that company under similar circumstances. Therein the defendants Sperry, Jones & Co. were the promoters of a corporation for the consolidation of several breweries; one brewer made a conditional contract for the transfer of his brewery; its fulfillment was dependent upon the procurement of other contracts of a similar character for the transfer of other breweries. The conditions upon which the contract was made were not complied with and it, consequently, never became a binding instrument, nor fixed the terms upon which Sperry, Jones & Co. became obligated to organize the company, or the brewer to convey his property. Subsequently Sperry, Jones & Co. purchased this property in their own names, and thereafter transferred it to the company at a less price than that for which the conditional contract called, taking payment therefor in the stock and bonds of the company. It was held that as to that transfer Sperry, Jones & Co. occupied no fiduciary relation to the company. All of the property in that case which was transferred to the company was owned by the defendants Sperry, Jones & Co. and they conveyed this property to the company, taking in exchange therefor its stock and bonds. No prospectus was issued, no invitation was extended to any person or to the general public at that time to subscribe for the stock or bonds of the company, and none had been subscribed for. The sole persons in interest were Sperry, Jones & Co. who owned the property which was transferred, and in the formation of the company they owned the stock and bonds; consequently the transaction constituted a simple exchange of property for stock and bonds. No fiduciary relation existed, nor could it exist in such a transaction between the company and Sperry, Jones

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& Co. and, consequently, no one could be defrauded, as the only persons in interest owned both the property and the stock and bonds. In addition to this all of the stockholders present at a meeting with full knowledge of the situation, ratified the transaction and authorized an additional issue of stock and bonds for other property transferred by Sperry, Jones & Co. Nothing was concealed. The value of the property was understood and the character of the exchange was consented to by every party in interest. The case in principle is precisely like *Parsons v. Hayes* (*supra*). When the property was transferred and the stock and bonds were issued to the defendants, if they had continued to hold the same and carry on the business, no one could have any just cause of complaint. In selling the stock to purchasers as they subsequently did, they stood in the relation to such transaction and the purchaser as vendor and vendee, and were subject only to the rules which obtain in such relation. No cause of action by reason of that transaction could accrue in favor of the company or its representatives upon liquidation, and the court so held, stating that if there was any liability it was in favor of the purchasers of the stock if they had been defrauded upon a sale of the same. The court cites with approval the cases of *Salomon v. Salomon & Co.* (App. Cas. [1897] 22); *Matter of Ambrose Lake Tin & Copper Mining Co.* (*supra*), and 1 *Morawetz Corp.* [2d ed.] § 290.) But the court had no difficulty in reconciling these cases and their doctrine with that announced in *Gluckstein v. Barnes* (*supra*) and *Erlanger v. New Sombbrero Phosphate Co.* (*supra*), and stated "there is no real conflict between these authorities."

We do not find it necessary to examine in detail all of the cases cited by the learned counsel for the appellants in support of his proposition. The cases to which attention has been called are those which are mainly relied upon by him and are as strong in support of his contention as any to be found. All of the cases which he cites and relies upon, save *Colton Improvement Co. v. Richter* (*supra*), which he criticises as being erroneously decided, fall into one of two classes: *First*, those cases where one or more persons own an entire property or business, incorporate a company for purposes of convenience or to prevent complication in dealing with the property, and the organization so formed does not intend or expect any other persons to join them as stock-

holders. In such transaction it is of no consequence what value is attached to the property or what is the amount of the stock or bonds issued, as the company and its creators do not represent conflicting interests and no fraud upon the company is, therefore, possible. Such a case is represented in this State by *Seymour v. S. F. C. Assn.* (144 N. Y. 333) and in England by *Salomon v. Salomon & Co.* (*supra*) and many others. *Second*, where a corporation is formed by owners of property and the property is taken in exchange for stock and bonds at an excessive overvaluation, and after the organization is completed and the property is represented in stock or bonds, they are sold to the public. It will be found in all such cases that the organizers of the company owned the property or furnished the money to buy it before the creation of the company, and sold the shares to the public after the company had been formed and the stock had all been issued. Under such circumstances, as we have seen, if any fraud is perpetrated, it is not upon the company but upon the purchasers of the stock, and no action will lie to redress any wrong by the company, because it has suffered none. If fraud be perpetrated in the sale of stock, the action is in deceit, and lies in favor of the individual wronged against the person doing wrong. Such case falls within *Parsons v. Hayes* (*supra*); *Tompkins v. Sperry, Jones & Co.* (*supra*); *Barr v. N. Y., L. E. & W. R. R. Co.* (125 N. Y. 263), and *Drake v. N. Y. Suburban Water Co.* (26 App. Div. 499) in this country and *Matter of Ambrose Lake Tin & Copper Mining Co.* (*supra*); and *Matter of Lady Forrest (Murchison) Gold Mine, Ltd.* (*supra*) in England. It is evident that the transaction averred in this complaint falls within neither class of these cases, for here this property was not transferred nor the corporation created as matter of convenience in holding and disposing of property, in which those in interest were both owners and incorporators. Nor were Moore & Schley owners of the property purchased with their money, nor was the corporation formed for the purpose of taking over the property and issuing all of the stock therein to the owners of it so that both interests combined in ownership and were changed in form only. Such was not the condition which existed, nor do the facts correspond to make it such in relationship.

Rather does it fall within a third class, where the promoter

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for his own interest and in order to make a profit, promotes a company and invites the public to subscribe for shares, not yet issued, but thereafter to be issued, by which the property which is to become the assets of the corporation is to be purchased with money thus furnished, and the whole scheme is consummated without pecuniary aid on the part of the promoter and without risk of any of his own money in the transaction. In the first and second classes named there is and can be no fiduciary relation between the owners of the property and the corporation, or its creators. Both own all there is in property and in stock. They deal with themselves and there is no obligation of good faith, because nothing, either person or corporation, is in existence, or comes into existence requiring such observance. In the third class from beginning to end it deals with others and with their property and money in order to make a profit. From beginning to end it makes use of means by which money is obtained, not from themselves, but from outside parties and by and through which alone it is enabled to fulfill and carry out the scheme. Under such circumstances the promoter continually stands in a fiduciary relation to persons and corporation. His relation is fiduciary when he invites subscriptions to shares of stock; his relation is fiduciary when, having obtained the money, he causes the corporation to be formed to take over the property to be purchased by the money thus obtained, and it continues to be fiduciary in all dealings with the corporation during the time it is under such control. Under such circumstances the language of Lord PENZANCE in *Erlanger v. New Sombrero Phosphate Co.* (*supra*), finds precise application: "First, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and, secondly, that this result was brought about by the conduct and contrivance of the vendors themselves. It was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing they used that power and opportunity for the advancement of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were, as

it seems to me, bound according to the principles constantly acted upon in the courts of equity, if they wished to make a valid contract of sale to the company, to nominate independent directors and fully disclose the material facts. The obligation rests upon them to show they have not made use of the position which they occupied to benefit themselves." In speaking of the opportunity which gives to persons unlimited power to create corporations, Lord O'HAGAN says (S. C., p. 1255): "It required in its exercise, the utmost good faith, the completest truthfulness, and a careful regard to the protection of the future shareholders. The power to nominate a directorate is manifestly capable of great abuse, and may involve in the misuse of it, very evil consequences to multitudes of people who have little capacity to guard themselves. Such a power may or may not have been wisely permitted to exist. I venture to have doubts upon the point. It tempts too much to fraudulent contrivance and mischievous deception; and, at least, it should be watched with jealousy and restrained from employment in such a way as to mislead the ignorant and the unwary. In all such cases the directorate nominated by the promoters should stand between them and the public, with such independence and intelligence that they may be expected to deal fairly, impartially, and with adequate knowledge in the affairs submitted to their control." In that case the property was purchased by a syndicate, who transferred it to the corporation at an excessive valuation, and it was held that the relation between the company and the persons transferring the property was fiduciary in character and they owed to it the obligation. In *Gluckstein v. Barnes* (*supra*) the syndicate was formed to purchase the property at a judicial sale and make a resale to the company, subsequently to be formed. The syndicate bought some of the debenture bonds at a discount and also a mortgage, by which they made a profit of £20,000. They purchased the property at the sale for £140,000 and contracted to transfer it to the company for £180,000, concealing the profit which they made in the purchase of the debentures and the mortgage. After the company was formed they issued a prospectus, stating the price for which the property was purchased and the price at which it would be transferred to the company, but did not disclose therein the £20,000 secret profit, although the prospectus did state: "Any other profits

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made by the syndicate from interim investments are excluded from the sale to the company." Under these circumstances it was held in an action on behalf of the company to compel an accounting of the undisclosed profits which had been made that, although it appeared that the company, its trustees and directors, were the same persons who bought in the property, formed the company and offered its debenture bonds for sale, yet that they owed to the subscriber who paid for the debentures and bonds the duty of fully disclosing all of the profits which they made, and that they were bound to protect the company in such matter as trustees and directors, and that their failure so to do was not only a fraud upon the purchasers of the debentures and bonds, but was a fraud upon the company, and they were bound to account to it for the undisclosed profits which they made. We are not required to go so far as does the doctrine announced in that case to sustain the cause of action averred in this pleading.

It is evident, therefore, that by the averments of this complaint Moore & Schley fall into the category of promoters, owing a fiduciary relation to the company which they created, and charged with the obligation of protecting its interests and they could not make a profit out of the company in the transaction without fully disclosing the same and dealing in respect thereto fairly and openly. Such open and fair dealing is not had and proper protection is not given to the corporation which they control, when, without giving anything of value, they take the stock issued by the company and appropriate it to their own use. Under such circumstances, and well within the authorities which we have cited, a wrong is done to the company and a case is created where equity will lay hold of the transaction and compel an accounting. Nor is the rescission of the contract of sale the remedy in such a case. There are no averments in this complaint showing or tending to show that there was any wrong done to the corporation in transferring to it the malting properties. From all that appears the corporation received full value for the stock which it gave in exchange for the properties, and such transaction is not tainted in any respect with wrongdoing. There is, therefore, no ground upon which a rescission of the transfers of the malting properties could be based. There is a class of cases holding that

rescission of the contract is the proper remedy of the company where it has been defrauded in making it, and if no changes have taken place in the property or right accrued in connection with it, rescission may be proper. Where, however, there have been changes, a rescission will not be made, and an action lies for an accounting. (*Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101; *Matter of Olympia, Limited*, 2 Ch. Div. [1898] 153.) The only remedy which can be invoked in this case is to compel Moore & Schley to make restitution of the stock which they have taken and converted to their own use, or to account for the same, or its proceeds, if they have disposed of it. The corporation under the averments of this complaint has made no contract which requires rescission. It avers in legal effect a breach of trust resulting in a conversion of this stock by the defendants Moore & Schley, and it is to recover it or its value that the action seeks, and the action will clearly lie for such purpose.

It is further claimed that the plaintiffs have been guilty of such *laches* as defeats the right to maintain this action. *Laches* is ordinarily to be presented by answer and not by demurrer. (*Sage v. Culver*, 147 N. Y. 241; *Zebley v. F. L. & T. Co.*, 139 id. 461.) The complaint avers the time when the misappropriation was discovered and, if there has been any *laches* in prosecuting the claims, it can be made to appear upon the trial; the court will not dispose of such question upon demurrer. The complaint is sufficient to show that of the secret profit no one had notice save Moore & Schley, and the directors of the company, whom they controlled, and the averments in this respect are sufficiently broad to permit showing that there was no ratification or knowledge by the plaintiffs or by their predecessors in title. Under such circumstances there is no basis upon which to predicate an estoppel. Estoppel, like *laches*, usually constitutes matter of defense. Estoppel in this case cannot be enforced, based upon the acquiescence of the directors of the company and Eicks, the holder of the stock, and this for the reason that Eicks' holding was fiduciary for the company and those legally entitled to the stock and no transfer of it could be justified under the facts averred, except to those who subscribed for it and who were entitled to the respective allotments, either for property or cash. The acts leading up to the appropriation by Moore &

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Schley of the stock were a breach of the relation which existed between them and the company which they were bound to protect, and out of such circumstances there could arise no estoppel as against subsequent holders of the stock who took the same without knowledge of the facts. Promoters are held to liability even though all of the stock is issued in the first instance to them and they have control of the company. (*Brewster v. Hatch, supra*; *Pittsburg Mining Co. v. Spooner, supra*.)

We conclude, therefore, that upon the main questions this complaint states a good cause of action and the demurrer thereto was properly overruled. As to the demurrer of the defendant Eicks the allegations are that he acted as the agent of Moore & Schley, and it is not shown that he is liable to respond in anywise for any of his acts. While he may not be a necessary party to the action, yet, inasmuch as the transactions were largely through him he is a proper party, and the action being in equity he is properly made a party within section 447 of the Code of Civil Procedure as he may have some interest in the controversy.

In support of the demurrer of the executors of John G. Moore, deceased, it is claimed that it must be sustained for the reason that no facts are alleged showing that complete satisfaction cannot be procured from the surviving members of the firm of Moore & Schley, and that such averment is essential to the statement of a cause of action against them. Assuming that the complaint is to be treated as averring a cause of action against Moore & Schley as copartners we think the contention of the executors cannot be sustained. It may be admitted that at common law an action could not be maintained, even in equity, which joined surviving partners with the personal representatives of a deceased copartner in the absence of allegations showing insolvency of the surviving copartners. Such seems to be the rule announced in *Lawrence v. Trustees, etc.* (2 Den. 577). The rule was otherwise in England, where it was finally settled that in an action in equity the personal representatives of the deceased copartner could be joined, even though a legal remedy existed only against the survivors of the copartnership. (Wms. Exrs. [6th Am. ed.] 1848.) Whatever doubts may have existed in this State respecting the right to make personal representatives of a deceased copartner parties with the survivors in an action

in equity where equitable relief may be properly invoked, it was set at rest by the provisions of section 118 of the Code of Procedure where the right was expressly given, and such rule has been continued in the provisions of section 447 of the Code of Civil Procedure. In *Voorhis v. Childs' Executor* (17 N. Y. 354), Judge SELDEN, writing for the court, exhaustively considered the subject. That was an action at law for the recovery of a debt wherein the personal representatives were joined, and in sustaining the demurrer that the joinder could not be had in a legal action the court stated: "As, therefore, the present action must be regarded as one of a purely legal nature, brought against the surviving partners, upon their legal liability, it follows that the executors of the deceased partner, who is liable only in equity, were improperly made parties." In *Potts v. Dounce* (173 N. Y. 335) the action was also one at law to enforce a debt, and Judge GRAY in writing for the court therein said: "But, while the legal rule of liability has been changed, the rule of procedure is not and when the personal representatives of the deceased joint debtor are directly proceeded against at law, the plaintiff should still allege and prove the insolvency, or inability to pay, of the survivors." *Hotopp v. Huber* (160 N. Y. 524) was likewise an action at law, and the same rule was applied. It must, therefore, be now regarded as settled that in an action at law the personal representatives of a deceased copartner are not proper parties unless it be averred and proved that the survivors are insolvent and unable to meet the demand sought to be established. In an equitable action the rule is otherwise, and the personal representatives are proper parties without averring or proving the insolvency of the survivors. The rule, however, that the representatives of deceased copartners could not be joined in the first instance, or proceeded against in equity, was never extended to that class of equitable actions which involved a breach of trust. Where the relations out of which arise the cause of action are predicated upon an obligation involving a wrong, or violation of duty, as agent or trustee, the personal representatives were always proper parties in the settlement of the controversy involving an examination of the quality of the acts. (*Bailey v. Inglee*, 2 Paige, 278; *Cunningham v. Pell*, 5 id. 607; *Sortore v. Scott*, 6 Lans. 271.) And in similar actions to this, involving the same relief which is sought for herein, personal representatives have been

regarded as proper parties. (*Getty v. Devlin*, 54 N. Y. 403; 70 id. 504; *Erlanger v. New Sombrero Phosphate Co.*, *supra*.) It is quite possible to construe this complaint as stating personal acts of the several defendants therein, in the accomplishment of the scheme, for its averment is that the "said Moore and said defendants Schley, Chapman, Timmerman, Casilear and Eicks committed and performed the acts hereinafter set forth." This is an affirmative allegation of personal acts upon the part of the defendants, and the characterization of such acts, thereafter, under the name of Moore & Schley, is rather matter of brevity than of substance. If the complaint is ambiguous in this respect, it is doubtless to be taken most strongly against the pleader. But whether this construction be given to it or not, we do not consider of consequence, as we have reached the conclusion that this being inherently an equitable action to redress a wrong that all of the parties affected thereby are properly made parties.

It follows from these views that the interlocutory judgment should be affirmed, with costs, with leave to the defendants to withdraw the demurrer and serve an answer within twenty days upon the payment of costs in this court and in the court below.

LAUGHLIN, J., concurred.

Judgment reversed, with costs, and demurrer sustained, with costs, with leave to plaintiff to amend on payment of costs in this court and in the court below.

NEW YORK BANK NOTE COMPANY, Appellant, v. THE HAMILTON BANK NOTE ENGRAVING AND PRINTING COMPANY and KIDDER PRESS MANUFACTURING COMPANY, Respondents.

Referee's report — verbal error in, not corrected on appeal — profits from the unlawful use of a printing press, the subject of a monopoly — burden of proof as to the profits — the damages being unliquidated interest is not allowable.

The question whether a referee, who, in his report, stated, "I further find and report in making such statement that no proof of the profits so charged the defendants could have been made or received by them but for the use by them of the machines in question," intended to say "part" instead of proof cannot

be considered on an appeal from an order refusing to confirm the report. The remedy is in the court below.

In an action brought to restrain the use by the defendant of two presses known as the Kidder perfecting presses, and for an accounting of the profits made by the defendant in printing strip tickets upon said presses, an interlocutory judgment was entered granting the injunction and appointing a referee to assess the plaintiff's damages. Such damages were adjudged to be the "profits made by the defendant the Hamilton Bank Note Engraving and Printing Company upon all strip tickets printed by it upon the two aforesaid presses purchased from the Kidder Press Manufacturing Company, known as the Kidder Perfecting Press, on proof before the referee that the Kidder Perfecting Press was the subject of a monopoly for strip ticket printing by virtue of outstanding patents, or was the only available machinery for printing strip tickets, or on proof that the Hamilton Bank Note Engraving and Printing Company could not have obtained the contracts to print said tickets except by means of the Kidder Perfecting Press, and in the absence of such proof that the damages shall be the saving in profit on said tickets by the use of the Kidder Perfecting Presses over the profits it would have made by printing the same on the presses in its possession, or known to and purchasable by it prior to December 29, 1892."

Held, that the provision of the judgment directing that, in certain contingencies, the plaintiff's damages should be ascertained on the basis of the difference in the profits realized from printing strip tickets on the Kidder perfecting presses and those realized from printing the strip tickets on other presses available to the defendant had been made for the defendant's benefit, and that the burden of showing the extent of the profits which would have been realized by printing the strip tickets upon other machines available to the defendant rested upon it;

That, as it appeared that the damages were unliquidated, and that there was no method by which the defendant could have computed the amount thereof, they being dependent on extrinsic facts, over the proof of which the defendant had no control, the plaintiff was not entitled to interest on such damages. INGRAHAM, J., dissented.

APPEAL by the plaintiff, the New York Bank Note Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of December, 1903, sustaining the defendants' exceptions to the report of a referee theretofore appointed herein and denying the plaintiff's motion to confirm said report.

Edward P. Lyon, for the appellant.

Charles F. Brown, for the respondents.

VAN BRUNT, P. J. :

This action was brought to restrain the use by the defendant The Hamilton Bank Note Engraving and Printing Company of two presses known as the Kidder perfecting presses, and for an accounting of the profits made by the defendant bank note company in printing strip tickets upon said presses.

After the trial of the action an interlocutory judgment was entered restraining the use of the presses as prayed for in the complaint and awarding damages, and a reference was ordered to compute the same. Proceedings were subsequently had which resulted in the modification of the interlocutory judgment, whereby it was adjudged, among other things, as follows :

“Ordered, adjudged and decreed that the plaintiff recover from the defendants the damages which it has sustained by the breaches of the contract made between the New York Bank Note Company, plaintiff's assignor, and the Kidder Press Manufacturing Company, and dated the 12th day of October, 1891, set forth in the complaint, which damages shall be the profits made by the defendant the Hamilton Bank Note Engraving and Printing Company upon all strip tickets printed by it upon the two aforesaid presses purchased from the Kidder Press Manufacturing Company, known as the Kidder Perfecting Press, on proof before the referee that the Kidder Perfecting Press was the subject of a monopoly for strip ticket printing by virtue of outstanding patents, or was the only available machinery for printing strip tickets, or on proof that the Hamilton Bank Note Engraving and Printing Company could not have obtained the contracts to print said tickets except by means of the Kidder Perfecting Press, and in the absence of such proof that the damages shall be the saving in profit on said tickets by the use of the Kidder Perfecting Presses over the profits it would have made by printing the same on the presses in its possession, or known to and purchasable by it prior to December 29, 1892,” and a referee was appointed to compute the damages upon the basis laid down in this interlocutory judgment as amended.

The subsequent proceedings resulted in a report by a referee that the damages which the plaintiff was entitled to recover were the sum of \$73,058.86, with interest amounting to \$32,189.52, making in all at the date of the report \$105,248.38.

The defendants filed exceptions to this report, and upon a motion to overrule these exceptions and for final judgment upon the report, the exceptions were sustained and the motion for final judgment was denied. From the order thereupon entered this appeal is taken.

It is claimed by the appellant that it is apparent from the nature of the referee's report that a clerical error was made in that part of the report, where he says, "I further find and report in making such statement that no proof of the profits so charged the defendants could have been made or received by them but for the use by them of the machines in question," the claim being that the referee intended to say "part" instead of proof.

I do not see how we can consider any such question upon this appeal. If there was any mistake in the referee's report of the kind mentioned, it should have been corrected in the court below. The appeal here must be determined upon the record as we find it.

The respondents claim that the referee evidently intended by the language used that there was no proof before him that the profits which he determined were made could have been made by the Hamilton Company by the use of any other machine except the Kidder perfecting press.

They then say, "But this was not only not correct, but it was not the question which was referred to the learned referee for his determination. He was not directed to determine whether the profits made by the Hamilton Company could have been made by the use of any other machine."

In this view of the referee's duties I think that the counsel for the respondents have entirely misapprehended the questions which were referred to the referee. One of the questions which he was necessarily called to pass upon, under certain contingencies, was what profits could have been made by the Hamilton Company, by printing these tickets upon any machine other than the Kidder. If the plaintiff did not establish that the Kidder perfecting press was the subject of a monopoly for strip-ticket printing by virtue of outstanding patents, or was the only available machinery for printing strip tickets, or that the Hamilton Bank Note Engraving and Printing Company could not have obtained the contracts to print said tickets, except by means of the Kidder perfecting press, then it became the duty of the referee to determine what were the profits

of the printing upon the Kidder perfecting press, and what would have been the profits had the tickets been printed upon presses in the defendant Hamilton Company's possession, or known to and purchasable by it prior to December 29, 1892, and the difference was to be the damages which the plaintiff would have the right to recover.

It is claimed by the respondents that the Kidder perfecting press was not the subject of a monopoly by virtue of outstanding patents; that it was not the only available machinery for printing strip tickets; that the defendant the Hamilton Company did obtain contracts without said Kidder perfecting press, and they requested the referee so to find. It is true that the referee refused so to do, but he proceeded to assess the damages as if those facts had been established and in the manner in which he was directed to do by the decree.

It is of no consequence as to what the referee discussed in his opinion; the question is what did he report the profits to be of the printing of the tickets upon the Kidder machine, and what would have been the profits if the work had been done upon the presses of the defendant, the Hamilton Company, or presses available to it, the difference being the damage due the plaintiff.

He has reported distinctly upon these two points, as follows: The profits realized for the printing of the tickets upon the Kidder press he reported to be \$73,958.86, and that there was no proof before him of the profits which would have been made by the Hamilton Company by the use of any other machine except the Kidder perfecting press.

Thus, really but two questions are presented to be determined upon this appeal. One is whether the referee was correct in respect to the items with which he surcharged the Hamilton Company's account, and the other is whether there was any proof that profits could have been made had the Hamilton Company done the work upon its own machines, or upon machines available to it, and if there were, what was the amount of such profits.

There is also a subordinate question as to the allowance of interest which will be discussed later.

We will consider the second question first. The burden of proof in respect to this matter lay with the defendants. They were permitted by the decree to mitigate the damages by the amount that

they could show that they would have made had they done the work upon their own presses. I say upon their own presses, because there is no evidence that there were any better machines procurable to do the work than the ones that the defendant company had in their possession, unless it was the Kidder perfecting press.

There was no attempt made by the defendants to show with any degree of particularity as to what the profits were in printing these tickets upon the presses other than the Kidder perfecting press. It certainly was within their power to give accurate evidence upon this subject. Prior to the acquirement of the Kidder perfecting press the defendant company had been printing these strip tickets upon their own presses, and afterwards when the injunction in this action was granted they again printed their strip tickets upon their old presses. Under these circumstances it would seem that it would be possible to have given some precise data upon this subject.

This they utterly failed to do. They contented themselves with the testimony of the parties who had been guilty of the fraud for which the defendants were to account in this action, which was of the most general character, and to the effect that the Kidder machine was worse than useless, as it did not do as good work as the presses that had been in use before they acquired the Kidder perfecting press, and indeed, as Mr. Seebach says, "the Kidder" will not do "good work." Yet all the work of strip-ticket printing under the Manhattan contract after its acquisition was done on the Kidder prior to the injunction in this action at a confessedly large profit.

Furthermore, Mr. Seebach was contradicted upon so many material points by the evidence of other witnesses that but little weight could be given to any opinions that he might express, and upon this question of profit it seems to rest entirely upon the opinion of Mr. Seebach, because he gives no facts. One of the reasons that he gives for the undesirableness of the Kidder press is that it is a very complicated piece of machinery and was frequently getting out of repair, and that they were put to great expense in repairing it and also that they thereby lost a great deal of time. When asked to produce the bills for repairs he can only produce one, I think, and that for some insignificant piece of work.

When he attempts to say that the waste in one was as great as in

the other, he puts the waste from his old machines at twelve and one-half pounds of paper a day. He says that he had it weighed for a time. The man whom he (Seebach) says weighed the waste says that it was twenty-five or thirty pounds a day, and another witness says that it was more.

Mr. Seebach wholly fails to deny the testimony of Mr. Kendall that he (Seebach) told him that the cost to them of printing strip tickets upon the machines the defendant company had was fourteen cents a thousand. Nor does he deny Mr. Kendall's testimony that Seebach and himself examined the books of the defendant company and found from the books that that was the cost. All that Seebach will say about this is that he does not remember.

It being within the power of the defendants to have given accurate and certain evidence as to the cost of printing these strip tickets upon their old presses, from their failure to do so but one inference can be drawn, and that is that they could not. This provision in the decree as to the profits which could be made upon the old machines was for the defendants' benefit, and if they failed to produce reasonably convincing proof, which it was very easy for them to do had it existed, it does not lie in their mouth, they having been the wrongdoers, to complain if the conclusion is arrived at that they have not produced the proof because it did not exist.

Upon considering the whole of this evidence, it seems to me that the conclusion of the referee that there was no proof that profits could have been made upon the old machines of the defendants, was well founded. Our attention has been called to the findings of the previous referees upon this subject. From the view of the burden of proof that was taken by at least one of those referees his finding in this respect can be easily explained. If the burden of showing what was the difference of the profits had been upon the plaintiff, as the referee held, a different result might have been arrived at, but in the case as it now stands the burden is upon the defendants to reduce the damages by showing what profits would have been made by printing these tickets upon their old machines, and I repeat that in this case there was no reason for surmise, guess or inference; the defendant company had printed these very tickets upon their old machines, must have known exactly what they

cost, and never produced their books and showed from them what it was.

We will now consider the other principal question, and that is, was the referee justified in making the surcharges which he did upon the account of profits furnished by the defendant company. In the examination of this question we are embarrassed by the paucity of the evidence, by the light of which we could apportion the general expenses of the business between the various kinds of business done by the defendant company with its plant.

We must, therefore, get at the expense of the business as well as we can, and if proper allowances are not made to the defendant company, it arises from the fact that they have not given us the evidence from which we can deduce accurate results. We think, however, that the referee in some instances has not made sufficient allowance in respect to some of the items of expense in this business. I do not think he has allowed sufficient in the matter of rent. He has not even allowed rent for the space actually occupied for the strip-ticket business, and in addition to the space actually occupied some percentage of the vacant space consisting of passageways, etc., should certainly be allowed. This would add at least 300 feet to the estimate of the referee and make the surcharge about \$3,630 instead of \$6,756.

So, in regard to managerial expenses, it would seem proper to allow the same percentage, as these are general expenses which relate to the management of the whole business, in the same manner as rent. I think that there should have been allowed under this head about \$6,500 instead of \$3,000, which was allowed.

For the same reasons a proper proportion of the general expenses should have been allowed. They are incurred in the general conduct of the whole business and a proper amount was properly chargeable to the account of the strip-ticket printing. There should have been allowed upon this account the sum of \$6,782.31, instead of nothing. As interest upon capital there should have been allowed the sum of \$4,320 instead of \$3,226.50, the difference arising in the reduction in machine cost.

The loss on Kings County strip tickets seems to have been properly surcharged as that loss arose from their own business methods. The account would then stand thus:

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Admitted profits.....	\$34,626 65
Rent overcharged.....	5,630 00
Managers' salaries overcharged.....	6,500 00
General expenses overcharged.....	6,782 31
Interest on capital overcharged.....	5,830 00
Loss on Kings County tickets overcharged.....	1,888 09
Making.....	<u>\$60,546 95</u>

the amount with which the defendants are chargeable as the profits made by them by the printing of the strip tickets upon the Kidder perfecting press; and as the defendant company has not furnished any reliable evidence that any part of this profit could have been made upon the other presses which they had and upon which they printed these strip tickets both before and after they had acquired the Kidder perfecting press, the plaintiff was entitled to judgment for this amount.

The only question remaining is the one of interest. I do not think that interest was properly allowed. The damages were clearly unliquidated. There was no method by which the defendant could have computed the amount. The rule of damages depended upon extrinsic facts, over the proof of which they had no control. I do not see but that the rule in respect to interest on profits in the case of an infringement of a patent should not be applied in this case.

I think, therefore, that the order appealed from should be reversed and judgment entered upon the referee's report in favor of the plaintiff for \$60,546.95, with interest from the date of his report, without costs of this appeal and with costs in the court below.

PATTERSON, HATCH and LAUGHLIN, JJ., concurred; INGRAHAM, J., dissented.

Order reversed and judgment directed as stated in opinion, without costs of appeal, and with costs in the court below.

NEW JERSEY STEEL AND IRON COMPANY, Respondent, v. ANDREW J. ROBINSON and Others, Respondents, Impleaded with FRANCIS S. KINNEY, Appellant.

Mechanic's lien — it attaches, where the contractor fails, and the owner completes the building, to the amount remaining due after deducting the cost of completing the building.

A building contract provided that the contractor should be paid the actual cost of the labor and materials, together with five per cent on such cost, but that the entire sum paid to him should not exceed \$317,810; that he should be paid, from time to time during the progress of the work, ninety per cent of the value of the labor and materials, together with two and a half per cent of the cost of such labor and materials, and should be paid the balance of the contract price upon the completion of the work.

The contractor made a general assignment for the benefit of creditors at a time when he had earned, over and above the payments received by him, \$70,761.90. Under the provisions of the contract providing for the retention of ten per cent of the cost of the labor and materials and of two and a half per cent of such cost until the completion of the work, only \$58,967.85 was then due and payable to him. Subsequent to the making of the general assignment, the owner, pursuant to a provision of the contract, completed the work at such a cost that only \$58,898.76 remained due to the contractor.

Held, that liens filed by sub-contractors and by materialmen did not attach to the \$70,761.90 which the contractor had earned at the time he made the general assignment, but only to the \$58,898.70 remaining due after the completion of the work.

APPEAL by the defendant, Francis S. Kinney, from a judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of New York on the 13th day of February, 1902, upon the report of a referee.

William H. Van Benschoten, for the appellant.

H. B. Closson, for the plaintiff, respondent.

Richard M. Martin, *Henry De Forest Baldwin*, *Edward J. Patterson* and *Frederick H. Man*, for the defendants, respondents.

VAN BRUNT, P. J. :

This action was brought to foreclose a mechanic's lien upon property owned by the defendant Francis S. Kinney. On or about the 5th

of June, 1899, the defendant Kinney made a contract with the defendant Robinson, whereby Robinson was to erect certain buildings upon property of said Kinney situate at the northwest corner of Madison avenue and Fifty-sixth street. The plaintiff and certain of the other defendants having supplied material and performed work upon these buildings, filed liens against the property. Robinson failed to comply with his contract, and made an assignment for the benefit of creditors, and under the terms of said contract the defendant Kinney completed the buildings himself. At the time of the assignment by Robinson the sum of \$70,761.90 had been earned under the contract, but was not payable by its terms; and when the work was completed by Kinney some thirteen months after Robinson's failure, this unpaid remainder of the contract price exceeded the expense incurred by Kinney in finishing the work by the sum of \$58,398.76; and the question presented upon this appeal is whether the liens filed attached to the \$70,761.90 which had been earned under the contract at the date of Robinson's assignment, or only to the \$58,398.76 which remained due after the completion of the work.

By reference to the contract it will be seen that but a small part of the \$70,761.90 earned under the contract was payable at the time of the assignment to Robinson. The terms of the contract were that the sum to be paid by the owner to the contractor "for said work and materials shall be the actual cost of labor and materials, meaning the actual amount (without addition or discounts of commissions) necessarily paid by the contractor, and in addition thereto five per centum (5%) upon such cost. But the contractor agrees as part of this contract that the total amount to be paid to him for cost of the entire work, including the 5% paid him for his services, shall not exceed the sum of Three hundred and seventeen thousand three hundred and ten dollars (\$317,310), * * * and that such sum shall be paid in current funds by the owner to the contractor in installments, as follows: From time to time during the progress of the work, in amounts equal to 90% of the value of materials furnished and labor performed, as may be certified by the architects, and in addition to this amount not to exceed 2½% on the cost of said labor and materials furnished as payment on account of contractor's commission for his services. The final payment to include

the balance due the contractor for all labor and materials furnished and for his commission for services, but in no case is this total amount to exceed the guarantee limiting cost of the entire work — namely, Three hundred and seventeen thousand three hundred and ten dollars (\$317,310).

“The final payment shall be made within thirty days after this contract is fulfilled.”

The referee has found that the defendant Robinson performed all the conditions of said contract until the 7th of March, 1900, when he failed in business and thereafter ceased to do any work on the buildings; and that Kinney, as provided in the contract, entered upon the premises and took possession of the same and completed the work. He also found that on the 7th of March, 1900, the price and value of the materials theretofore furnished, and the labor theretofore performed by the defendant Robinson upon the property was \$134,438.79, and his agreed commission of five per cent thereon was \$6,721.94, making a total of \$141,160.73. He also found that the total amount of the payments theretofore made by Kinney to and for account of Robinson was \$70,398.83, leaving \$70,761.90 earned upon the contract.

It is to be observed that by the terms of the contract but ninety per cent of the labor performed and materials furnished was to be paid to Robinson from time to time as the work progressed, and two and a half per cent of his commission upon the same. Therefore, under the contract, at the time of the filing of these liens, there was due from the owner to Robinson only the sum of \$53,967.85, which sum is arrived at as follows: Value of materials and labor, \$134,438.79; ninety per cent of this is \$121,004.91; add two and a half per cent on account of commissions, \$3,360.97, making the whole amount due and payable, \$124,365.88; from which deduct payments, \$70,398.83, leaving \$53,967.85, payable under the contract; and no more money would become due to him under the contract before its final completion, Kinney having the right to fulfill the contract and charge Robinson with the expense thereof.

Under these circumstances the liens could only attach to this sum of \$53,967.85 and whatever might become due over this sum in the completion of the contract. The amount which remained unpaid

upon the contract, in excess of the ninety per cent and two and a half per cent payable thereunder as the work progressed, was a security to the owner against any failure on the part of the contractor to complete his contract, and the owner could not be deprived of that security which he had provided for in his contract by the mere fact of the contractor failing to complete his contract and his creditors filing liens against the property. The result of the contrary view would be to deprive the owner of the security which he intended to, and did, take against the failure of the contractor to complete his contract, by providing that but a portion of the amount earned under the contract should become due until its completion. The owner had a right to take security for the performance of the contract, and he cannot be deprived of such security. It would seem, therefore, that the only fund to which the liens could apply would be this sum and such additional sums as became due and payable under the contract.

It is admitted that all of the money remaining unpaid under the contract above said sum of \$53,967.85 was used in the completion of the contract except \$4,430.91, leaving due and payable under the whole contract \$58,398.76.

We think, therefore, that the judgment should be modified by limiting the liens to the fund of \$58,398.76, remaining due upon the contract after completion. It would seem, in view of the fact that the figures which have been referred to are conceded by both sides, that there is no necessity for a new trial. A judgment may, therefore, be framed in accordance with this opinion. No costs of appeal to either party.

PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred ; LAUGHLIN, J., concurred in result.

Judgment modified and judgment directed as stated in opinion, without costs of appeal to either party.

CAROLINE STEINBACH, Respondent, v. THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, Appellant.

Amendment, by bringing in an additional defendant — costs, where the case has gone to the Court of Appeals on the question as to the necessity of so doing.

Upon the trial of an action the defendant made a motion to dismiss the complaint because of the failure of the plaintiff to join a party whose presence was alleged to be necessary. The motion was denied by the trial court and judgment was rendered in favor of the plaintiff. The ruling was sustained by the Appellate Division, but was reversed by the Court of Appeals, which granted a new trial, with costs to abide the event. The plaintiff thereupon made a motion to bring in the party in question and the motion was granted on payment of ten dollars costs.

Held, that the court should, as a condition of granting the motion, have required the plaintiff to pay fifty dollars costs.

VAN BRUNT, P. J., and INGRAHAM, J., dissented.

APPEAL by the defendant, The Prudential Insurance Company of America, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of July, 1903, granting the plaintiff's motion to amend the summons and complaint in the action and to bring in as an additional party defendant Sara Fehrman, as administratrix, etc., of Max Fehrman, deceased.

William O. Campbell, for the appellant.

Walter Large, for the respondent.

PATTERSON, J. :

The plaintiff was the holder of a policy of insurance upon the life of one Max Fehrman, now deceased. That policy was made payable "unto the executors, administrators or assigns" of the person named as the insured in the policy—that person being Max Fehrman. This action was brought to have the policy reformed by substituting for the words quoted the following: "Unto Caroline Lampp (the plaintiff), her executors, administrators or assigns." In the action as it was constituted no one representing the interest of Fehrman was made a party. At the trial a motion was made to dismiss the complaint, for the reason that no one representing the

assured named in the policy was before the court. That motion was denied, and on appeal to this court the ruling of the trial court was sustained (62 App. Div. 133); but on appeal to the Court of Appeals that tribunal held that the representatives of Fehrman were necessary parties, and that without them the action could not be maintained. Therefore, the judgment of the Special Term was reversed and a new trial was granted, with costs to abide the event (172 N. Y. 471). Thereupon the plaintiff made the present motion to bring in the representative of Fehrman, which was granted on the payment of ten dollars costs.

The only matter to be considered now relates to the terms imposed for allowing the amendment, and we think they are altogether inadequate. By the decision of the Court of Appeals, costs are not absolutely given to the defendant. They are to abide the event. The defendant has litigated a question involved in the case from the time of the trial until the decision by the Court of Appeals, and upon that question it has been successful. Now it is sought to change the case in the aspect in which it was disposed of by the Court of Appeals, and to deprive the defendant of the benefit of its appeals, simply upon the payment of ten dollars. That the amount involved in the action is small cannot affect the right of the defendant to some indemnity for the expense it has been put to in prosecuting its several appeals. The order should, therefore, be modified by requiring, as a condition for granting the motion, the payment of fifty dollars. As thus modified the order should be affirmed, without costs of this appeal.

HATCH and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., and INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

I concur with Mr. Justice PATTERSON in allowing the amendment, but I do not think the terms upon which it is to be allowed are sufficient. The plaintiff was not entitled to any relief upon the cause of action alleged as determined by the Court of Appeals. The defendant, therefore, is now entitled to a dismissal of the complaint, which would cover costs of the action, including costs of the two appeals. If the plaintiff is now permitted to amend so as to obviate the objection that has been held to be fatal to any recovery, the

defendant should certainly be allowed the costs of the action, including the costs of appeals; and I think that the payment of such costs should be the condition upon which the amendment is allowed.

VAN BRUNT, P. J. (dissenting):

I dissent. It seems to me the height of injustice to impose only fifty dollars costs as terms of amendment, when by such amendment there may be imposed on the defendant costs and disbursements for hundreds of dollars in respect to proceedings in which it has been successful.

Order modified by requiring as a condition of granting the motion the payment of fifty dollars. As thus modified order affirmed, without costs of appeal.

FLORENCE THAYER SMITH, Respondent, v. ARTHUR L. J. SMITH,
Appellant.

Charging a wife with unfaithfulness — it may constitute cruel treatment — alimony not allowed to a wife living at her husband's home — a counsel fee is proper.

Semble, that the action of a husband in charging his wife, in the hearing of their infant child and various other persons, with being unfaithful to him may constitute cruel and inhuman treatment entitling the wife to maintain an action for a separation.

Where, in an action brought by the wife for a separation on this ground it appears that the wife is living at the husband's home and is being adequately supported there by him, the court should not award the wife alimony *pendente lite* conditional upon her electing to quit her husband's residence. The court may, however, award the wife counsel fees *pendente lite*.

VAN BRUNT, P. J., and McLAUGHLIN, J., dissented.

APPEAL by the defendant, Arthur L. J. Smith, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of January, 1904, awarding to the plaintiff a counsel fee and temporary alimony.

Lewis L. Delafield, for the appellant.

A. H. Hummel, for the respondent.

PATTERSON, J. :

This is an appeal from an order granting alimony and counsel fees to the plaintiff in an action "for a separation." The allegations of the complaint and the statements contained in the plaintiff's affidavit upon which the motion was founded indicated that she seeks a decree of separation upon the first and second grounds upon which such an action may be maintained under the provisions of section 1762 of the Code of Civil Procedure, namely, cruel and inhuman treatment and such conduct on the part of her husband towards her as may render it unsafe and improper for her to cohabit with him.

It is well understood that in an action of this character the plaintiff must disclose merits; and it is sufficient to say concerning the second ground upon which the action is apparently based, that the proof is overwhelming that there is no prospect of the plaintiff's success on that ground. With respect to the ground of cruel and inhuman treatment, no act of violence is alleged or complained of. The only thing asserted against the defendant is that he has charged his wife at various times and in the hearing of their infant child and of various other persons with being unfaithful to him, which he qualifiedly admits by stating that such remarks were not made in the sense that she committed adultery, but that her conversation and consortation with other men was such as to compromise both herself and himself.

It has been held that the conduct of a husband impugning the chastity of his wife, especially in the presence of their children, shows "such an utter disregard of all the ordinary feelings and sentiments which should govern the conduct of a husband towards a wife that it was cruel and inhuman treatment in itself, which made it improper for her to live with a man who had proclaimed her" to be a wanton, "with no evidence whatever to sustain any such charge" (*Lutz v. Lutz*, 9 N. Y. Supp. 859), and in *Straus v. Straus* (67 Hun, 492) it is said that where a husband cruelly traduces the character of his wife, the court can properly protect her by a judgment of separation. So it may be that this action can be maintained on the first ground upon which the separation is sought, but that does not necessarily entitle the plaintiff to the order for alimony and counsel fees which was made in this case. It is provided in that order that not only counsel fees shall be paid to the plaintiff's attor-

neys, but the provision for alimony is made conditional upon the plaintiff's election to quit the residence of her husband, and thus the court has left it to her discretion to say whether she will continue to live with her husband during the pendency of the suit or not and has given her a right of selection, or in other words, to determine her own case in that regard; to stay with him if she chooses, or to leave him if she prefers to do so. It is apparent that she is now living with him or at his house, being provided for and supported by him; and according to his affidavit, which is not contradicted, within the limit of his means the provision he makes for her is liberal and he appears to be a man of ample means. It is not shown that occasion exists for her living elsewhere than in his house or for having any other provision made for her support than such as is already made. That much of the order, therefore, must be reversed, but as a separation may be adjudged (doubtful as that appears to be on these papers), I think the order for counsel fee may be upheld.

Therefore, the order appealed from should be modified by allowing counsel fees and striking out so much of it as provides for the payment of alimony *pendente lite* to the plaintiff. No costs to either party of this appeal.

O'BRIEN and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., and McLAUGHLIN, J., dissented.

McLAUGHLIN, J. (dissenting):

I dissent. Upon the facts set out in this record, I do not think the court should have allowed counsel fee.

VAN BRUNT, P. J., concurred.

Order modified by allowing counsel fees and striking out provision for payment of alimony, without costs to either party.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. COLERIDGE A. HART and Said COLERIDGE A. HART, Appellants, v. WILLIAM W. GOODRICH and Others, Respondents.

At an election held on November third a vacancy in the office of justice of the Supreme Court occurring on the previous August third may be filled — general allegations in a pleading will be disregarded where they are shown to be untenable by the specific allegations.

Under section 4 of article 6 of the Constitution of the State of New York, which provides, "When a vacancy shall occur otherwise than by expiration of term in the office of justice of the Supreme Court, the same shall be filled for a full term, at the next general election, happening not less than three months after such vacancy occurs," a vacancy in the office of justice of the Supreme Court occurring on August 3, 1896, may be filled at a general election held on November 3, 1896.

Where a complaint, after setting forth general allegations, which, if they stood alone, might be sufficient to sustain the complaint on demurrer, goes further and alleges specific facts from which it is made to appear that the ground or theory upon which the plaintiff made the general allegations is untenable, the general allegations will be disregarded.

APPEAL by the plaintiffs, The People of the State of New York ex rel. Coleridge A. Hart and said Coleridge A. Hart, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 31st day of December, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the defendants' separate demurrers to the plaintiffs' complaint and dismissing the said complaint.

Coleridge A. Hart, for the appellants.

Joseph A. Burr, for the respondents.

O'BRIEN, J. :

The plaintiffs seek in this action to determine the right of the four defendants to hold office as justices of the Supreme Court in the second judicial district of the State of New York. Each of the defendants demurred to the complaint on the ground that there had been a misjoinder of causes of action in that the offices held

were separate and distinct, and on the further ground that there were insufficient facts stated to constitute a cause of action. On the ground that causes of action were improperly united the demurrers were sustained, and from final judgment thus entered this appeal is taken.

The complaint avers that prior to the general election of November 3, 1896, the four defendants were nominated as candidates for justice of the Supreme Court in the second judicial district to be voted for at said election and at that time there were only three judicial positions or vacancies lawfully to be filled at said election; that there was a fourth vacancy caused by the death on August 3, 1896, of Calvin E. Pratt, justice of the Supreme Court in the second judicial district, but by section 4 of article 6 of the Constitution of the State of New York it was and is provided that such vacancy shall be filled for a full term at the next general election happening not less than three months after the occurrence thereof and such a general election did not occur on November 3, 1896; that upon the said election of 1896 the names of the four defendants were grouped together in a single vertical column and there was nothing on the ballots to indicate which of the said defendants the voters casting the same intended to elect in case there were but three instead of four vacancies; that on and after the first day of January next succeeding said general election the four defendants, each and all of them claiming and asserting that they had been elected thereat as such justice of the Supreme Court in said second judicial district, attempted to qualify and act and entered upon the duties of the office; that the vacancy caused by the death of Calvin E. Pratt could not lawfully be filled until the general election of November 2, 1897, and at such time the relator herein was duly voted for and elected his successor, but the defendants have withheld from him such office and have jointly and severally usurped the same. Judgment is asked "upon the pretended rights of said defendants and each of them to hold the office of justice of the Supreme Court in and for the Second Judicial District" and also upon the right of the relator to hold said office.

Without passing upon the question as to whether or not there is a misjoinder of causes of action, upon which ground the learned judge at Special Term dismissed the complaint, we think that upon

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the other ground, that there are insufficient facts stated therein to constitute a cause of action, the demurrers should be sustained.

The precise words of section 4 of article 6 of the State Constitution are as follows: "When a vacancy shall occur otherwise than by expiration of term in the office of justice of the Supreme Court, the same shall be filled for a full term, at the next general election, happening not less than three months after such vacancy occurs." The complaint shows that the vacancy which it is contended was not properly filled by the election of the defendants occurred on August 3, 1896, and that the election in question took place on November 3, 1896. At the date of the election, therefore, exactly three months had expired; and hence that election was not, by the terms of section 4 of article 6 of the Constitution, one forbidden for the purpose of choosing a successor to fill the vacancy. The prohibition is that it should occur at a time not less than three months; or, differently stated, the election should be at least three months after the vacancy. The second of November would have been less than the prescribed time, but the 3d of November, 1896, happened "not less than three months" or exactly three months, after the vacancy.

The Statutory Construction Law (Laws of 1892, chap. 677, § 26), although it has no application to or bearing upon the Constitution of the State, is not without use by way of analogy, in pointing out how statutes or laws should be construed. Therein it is provided that "a number of months after or before a certain day shall be computed by counting such number of calendar months from such day exclusive of the calendar month in which such day occurs and *shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made.*" Adopting this rule, the 3d of November, 1896, would mark the completion of three months from the death of the justice whose office it is claimed has been wrongfully filled, and hence the election did not occur at a time "less than" the three months.

The appellants' contention is that November 4, 1896, would have been the first date upon which an election could properly be held as that was the first day over three months from the time the vacancy occurred. This contention would be good if the provision

of the Constitution was that the election must be one happening *over* three months from the time of the vacancy; but the Constitution, as stated, provides that the election must be one "happening not less than" three months after the vacancy occurs, so that three situations may arise, namely, a time less than three months—at which time no legal election may take place—exactly three months and over three months, at which times a proper election may be held.

According, however, to the view of the appellants, that an entire three months must elapse before the happening of the election, then, strictly measuring the elapsed time, the vacancy occurred in the morning of August 3, 1896, and the election "happened" at the time the votes were cast (*People ex rel. Le Roy v. Foley*, 148 N. Y. 677), which was when the polls were closed at five o'clock in the afternoon of November 3, 1896, so that there was over three months of elapsed time.

That the construction which we have given, however, to the constitutional provision is the one ordinarily adopted in analogous cases appears from a reference to the authorities, among which may be cited *People v. Burgess* (153 N. Y. 561) and *Jones v. Wallace* (75 App. Div. 401). In the *Burgess* case the court construed section 1042 of the Code of Civil Procedure, which directed the county clerk to draw trial jurors on a day *not less than* fourteen days before the day appointed for holding each Trial Term, and a Trial Term having been appointed to be held on *March sixteenth*, a drawing on *March second* was held good, the difference being exactly fourteen days. And in the *Wallace* case, under a statute providing that service of a summons and complaint shall be made *not less than six days* before the return day thereof, service on November twenty-ninth of a summons with a verified complaint attached thereto returnable December fifth was held good, a difference of exactly six days.

In this complaint there are general allegations that the defendants have usurped and unlawfully hold office, and if these stood alone they might be sufficient to require an answer (*People ex rel. Crane v. Ryder*, 12 N. Y. 433), but the complaint goes further and specifies the facts from which is made to appear the ground or theory upon which the plaintiffs claim that the alleged unlawful holding

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arises, and these specific allegations being insufficient, because not stating a cause of action, it follows that the pleading itself is insufficient. (Abb. Tr. Brief Pl. § 63.)

We think, therefore, that the demurrers should be sustained and the judgment entered dismissing the complaint was right and should be affirmed, with costs.

PATTERSON, McLAUGHLIN and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., concurred in result.

Judgment affirmed, with costs.

JULIUS WOLFF, Appellant, v. THE CITY OF NEW YORK, Respondent.

Payment for a permit to repair an areaway, in existence for fifty years, in a street in New York city — when it is voluntary and cannot be recovered.

An owner of a building in the city of New York, in front of which there had existed continuously since 1854, apparently without any permit from the city authorities, an areaway under the sidewalk, attempted, in 1897, to replace the wooden cover of said areaway with an iron one. The commissioner of public works had requested the police commissioner to prevent work from being done, without a permit, on vaults in the public streets. While the work of replacing the cover was being performed by a contractor employed by the owner, a policeman appeared and demanded the production of a permit from the department of public works. The permit not being produced, he threatened to arrest the workmen. The owner, being informed of these facts, applied for and obtained from the department of public works a permit for the construction of a vault under the sidewalk, paying therefor the sum of \$229.50. He made no claim to any city authority that he had any existing right to construct the areaway. It did not appear that the vault privileges conferred by the permit were not in excess of those previously exercised by the owner.

Held, that the payment for the permit was voluntary and that the owner was not entitled to recover from the city the amount which he paid therefor.

O'BRIEN and McLAUGHLIN, JJ., dissented.

APPEAL by the plaintiff, Julius Wolff, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 12th day of September, 1903, upon the decision of the court, rendered after a trial at the New York Trial Term, a jury having been waived, dismissing the complaint upon the merits.

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George I. Woolley, for the appellant.

Terence Farley, for the respondent.

INGRAHAM, J. :

The plaintiff is the owner of a piece of property on the easterly side of Hudson street, between Duane and Thomas streets, in the city of New York, upon which there had been a brick building since the year 1854. Annexed to that building there was what was described as a covered areaway, which extended into the street, and which appears to have had a superficial area of one hundred and fourteen and seventy-five one-hundredths square feet. This covered areaway had existed continuously since 1854. In April, 1897, the plaintiff was engaged in making repairs and alterations to this building. In carrying out these improvements he wished to cover the areaway with an iron cover, in which were inserted small pieces of glass. Prior to these alterations this areaway had been covered with heavy planks. In making this change the planks were removed, and a contractor for the plaintiff started to place the iron frame for the new cover, when a policeman asked for a permit from the department of public works. When no permit was produced he said that he would arrest those that worked there, because there was no permit from the department of public works. Upon the plaintiff being informed of this condition he gave to his architect a check for \$229.50, to the order of the department of public works, and signed an application for a permit. This application was dated April 20, 1897, and by it the plaintiff applied to the department of public works for permission "to construct under and in accordance with the ordinances of the corporation relative to vaults, cisterns and areas, a vault in conformity with the accompanying plan in front" of the plaintiff's premises, the said vault to be four feet six inches in width and twenty-five feet six inches in length, outside measurement, and to occupy one hundred and fourteen and seventy-five one-hundredths square feet, at two dollars a square foot, for \$229.50. The said application contained the following provision: "The party or parties procuring this permit hereby agrees to keep the pavement affected by constructing the vault in good order for the period of one year from the date of the filing of certificate of the completion of the work. The certificate shall be subject to revocation thereof

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at any time hereafter by the Commissioner of Public Works, when in his judgment the space occupied by said vault or any portion thereof may be required for any public improvements, or for violation of the terms and conditions herein." Upon the filing of this application and the payment of this sum of money, a permit was given by the department of public works to the plaintiff to construct a vault in front of the premises known as No. 44 Hudson street, used for business purposes, said vault to be four feet six inches in width and twenty-five feet six inches in length, outside measurement, and to occupy one hundred and fourteen and seventy-five one-hundredths square feet, "subject to obligation to construct recess or chamber for existing hydrant or stopecock, as per annexed plan, and upon condition that the person or persons to whom this permit is granted will in all respects comply with the corporation ordinances relative to 'vaults, cisterns and areas,' " and upon the further condition that the permit gave no authority "and it is strictly forbidden to disturb, by excavation or otherwise or in any way damage or interfere with the proper use of any lamp post," or other fixture connected with the sewer or water system; and permission was also given to erect a bridge not to exceed five feet in height above the sidewalk and ten feet in width, with steps leading to said bridge to rest on the sidewalk of the adjoining premises during the construction of the vault, and by it the party procuring the permit agreed to keep the pavement affected by constructing the vault in good order for a period of one year from the date of filing surveyor's certificate upon completion of the work; and the permit was issued subject to revocation at any time by the commissioner of public works. Upon payment of this sum of money and the receipt of the permit the plaintiff completed the construction of the vault.

There was no claim made to the commissioner of public works or any other city authority that the plaintiff had any right to construct this vault or covered area way, either under a permit before granted by the city, or by prescription, or upon any other grounds. All that appears is that the plaintiff commenced some construction in the street when he was stopped by a policeman, who in effect stated that before any interference with the street could be allowed he must have a permit from the proper city department, and upon that notice being given by the policeman, the plaintiff voluntarily made an application

for a permit to construct a vault under the sidewalk, presented that application to the proper city authorities and was granted the permit upon payment of the sum fixed for such permits. It nowhere appears that the space before occupied by the plaintiff included all that was given by the city by this permit, or that the right acquired by the permit was not in excess of that before used by the plaintiff as a part of his building. By this permit the plaintiff has acquired a right to construct a vault in a public street, and for that purpose to use the surface of the street. There is, therefore, nothing to show but that the plaintiff acquired a right, by virtue of this permit, in excess of that which had been before used, and which would be a good consideration for the payment of the money for which this permit was issued. The plaintiff having obtained this permit on payment of the \$229.50 to the city on the 20th of April, 1897, and having then completed his repairs to his building and used so much of the street allowed to be used by the permit, on the 9th of April, 1903, nearly six years thereafter, commenced this action to recover back the amount that had been paid for the permit.

There was proof that the commissioner of public works had requested the police commissioners to prevent work being done without a permit on vaults in the public streets. Irrespective of the right of the plaintiff to construct a vault or areaway cover in front of his premises, it was not illegal for the police authorities to require persons disturbing the surface of the street or constructing vaults in the street to produce a permit or authority to thus incumber the street before being allowed to continue the work. There was nothing to show that the city officers were informed that the plaintiff had or claimed a right in the street. The policeman said that he would arrest those engaged in disturbing the street unless they had a permit from the proper city authorities. He made no attempt to adjudicate upon the plaintiff's right to construct this areaway, nor did the plaintiff or his contractor insist to the policeman that the plaintiff had a right to construct this vault. Any unauthorized obstruction in the public streets or interference with the surface of the streets is a misdemeanor and justifies a police officer in arresting those engaged in committing the offense. It was the duty of the plaintiff to obtain a permit before he disturbed the surface of the street in his building operations; and if he had a right to

a permit therefor without compensation, it is to be presumed that upon a statement of the facts to the proper municipal officers he would have been granted the permit without payment. He did nothing of the kind. He signed an application for a regular vault permit, which, so far as appears from this record, he did not theretofore have, and which allowed him to construct in the street a vault which he had not before constructed. He had a right to make such an application for a permit, which would insure to him by a formal legal instrument an undisputed right to use this street during the continuance of the permit, and to agree to pay therefor a sum of money; and the city had a right to issue the permit and receive the money. It cannot be said that what was granted to the plaintiff was nothing more than a right to continue a use to which he was entitled, and it cannot be said that the payment of this money to the city was without a consideration received by the plaintiff.

Nor can it be said that this payment was obtained from the plaintiff by duress. As before stated, there was no adjudication by the policeman that the plaintiff had no right to reconstruct the building as he proposed doing. All that the policeman required was that his right to use this portion of the street should be determined by the proper authorities. It could not have been supposed by the plaintiff that a policeman was authorized to determine questions of law as to the right of the plaintiff to maintain this structure in the street. If the plaintiff had stated the facts to the commissioner of public works and requested a permit to reconstruct this areaway and that had been refused, and in order to continue the construction of the building he had been required to pay this sum of money, a different question would have been presented. When he was informed that the policeman required that the proper city officials should grant a permit before he would be allowed to continue he made an application to the department of public works for a permit, which was granted and for which he paid the consideration prescribed by the city ordinance. The plaintiff had a right to apply for a formal written permit which would insure to him the right to use a portion of the street in addition to the right which he claimed by prescription. No permit to reconstruct his building in the condition in which it had existed since 1854 was ever applied for or refused. No threat was ever made that unless he paid this

sum of money he would be arrested or interfered with, and it seems to me clear that he voluntarily applied for a right which was granted him and voluntarily paid the consideration fixed by law for acquiring such a right. He retains this permit and claims a right under it and under no principle with which I am familiar is he entitled, holding the permit, to recover back the consideration paid for it. Neither in his pleadings nor upon the trial did he offer to surrender the permit.

There is a material distinction between this case and *Deshong v. City of New York* (176 N. Y. 475), as in that case it was proved that while the new vault was being constructed a deputy or inspector of the department of highways came to the place, stated to the plaintiff that his men must stop work and declared that if they continued he would have the plaintiff and all the men who were at work arrested, and that to avoid this arrest and retain possession of the property so that the building and its appurtenances might be completed and occupied, the plaintiff was required to pay the sum of \$914, which he did under protest. In discussing whether payment under those circumstances was a voluntary payment, the court said: "Payments coerced by duress or unlawful compulsion may be recovered back. The coercion, however, must be illegal, unjust or oppressive. One of the several and perhaps most common instances of duress is by threats of actual imprisonment unless the required act shall be performed. * * * If the city made the charge and demanded its payment without authority of law it was void, and the action of its officers in enforcing it by threats of arrest and by taking unlawful possession of the plaintiff's property was illegal, and payment by him was not so far voluntary as to prevent a recovery in this action." In this case there was no threat of this kind. No inspector or official of the department of public works informed the plaintiff that he must pay this sum or he would be arrested, nor was any possession taken of his premises. All that the policeman did was to say that the plaintiff must exhibit a permit to use the street to avoid an arrest for an unauthorized appropriation or interference with the surface of the street. This may be assumed to have been in pursuance of a regulation of the department of the city government having charge of the streets providing that persons who attempt to interfere with the public streets

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without a permit should be arrested. This seems to be an entirely reasonable regulation to prevent encroachments upon the streets and to require persons attempting to use the street to exhibit their right to use it. The plaintiff applied to the proper officer for a permit, which was granted to him upon the terms that he offered to pay in his application, without any threat on the part of the municipal officer of any kind; and, so far as appears, the only application that he ever made to any of the public officials was the application for the permit upon paying the sum of money named, which application was granted and the permit issued. If there ever was a case in which a payment was voluntary, this is such a case; and it seems clear that the plaintiff cannot retain the advantage which he has procured by the issuance to him of this permit and recover back the money that he paid in consideration of its being issued.

It follows that the judgment appealed from must be affirmed, with costs.

VAN BRUNT, P. J., and HATCH, J., concurred; O'BRIEN and McLAUGHLIN, JJ., dissented.

McLAUGHLIN, J. (dissenting):

I dissent. The vault in question existed without objection, so far as appears, from any one or the city, from 1853 to the time the demand was made for the payment of the money, to recover which this action is brought. This being so, a presumption under the rule laid down in *Deshong v. City of New York* (176 N. Y. 475) prevailed that it was originally constructed with the consent of the municipal authorities, and this presumption was not overcome by any proof offered at the trial. It is unquestionably true that the right of the public to the use of the streets is absolute and paramount to any other, and a presumption of consent or even an actual consent of the authorities to their use for private purposes is always subject and subordinate to the rights of the public whenever required for public purposes. Here the space occupied by the vault is not sought to be taken by the city for public use, nor does the city object to the use which the plaintiff is making of it. What the city does object to is that such use shall be made of it by the plaintiff without his obtaining a permit, but the presumption is that he has already obtained a permit, and that being so, he cannot legally be

required to obtain another. (*People ex rel. Ziegler v. Collis*, 17 App. Div. 448; *Deshong v. City of New York*, *supra*.)

Nor do I think it can be said that the payment made was voluntary. After the old covering had been taken up and while the new one was being put down, the work was stopped by a policeman, who demanded a permit, and threatened to arrest the workmen if they continued without procuring one, and in this connection it appeared that the commissioner of public works had directed that the police department be requested to prevent such work being done without a permit; and plaintiff sought to show that a formal order had been issued to this effect but, on objection of the defendant, such evidence was excluded. The other evidence, however, was sufficient to show that the policeman who threatened the arrest was acting under the direction of the commissioner of public works. Indeed, it would seem to be hardly necessary to show that, because the Revised Ordinances of the city of New York (§ 319) forbid the construction of vaults without permits, and the police are charged with the enforcement of such ordinances.

For the foregoing reasons I think the judgment appealed from should be reversed, with costs, and a new trial ordered.

O'BRIEN, J., concurred.

Judgment affirmed, with costs.

THE GRAVES ELEVATOR COMPANY, Plaintiff, v. JOHN H. PARKER COMPANY and Others, Appellants, Impleaded with ALBERT OLIVER and CORNELIUS A. BURR, Doing Business under the Firm Name of OLIVER & BURR, Respondents, and THE CITY OF NEW YORK and Others, Defendants.

Amendment substituting an allegation of partial performance of a contract for one of complete performance—a referee may allow it on the trial—what precludes a principal contractor from objecting to a subcontractor's work—effect of the architect's certificate—claim for extra work disallowed.

A referee appointed to hear and determine the issues arising in an action has power, upon the trial thereof, to permit the answer of one of the defendants, which alleges complete performance by such defendant of a building contract, to be amended by alleging performance of the contract, except in certain

specified particulars, performance of which has been waived by the other party to the contract. Such an amendment does not substantially change the cause of action.

Where the principal contractor for the construction of a building, accepts the work of a sub-contractor, tenders it as a compliance with the principal contract, obtains the certificate of the owner's architect that the principal contract has been performed, and receives payment of the contract price, he is not in a position to say that the sub-contract was not completed in accordance with the terms and specifications of the original contract.

The architect's certificate that the principal contract had been satisfactorily performed, is a sufficient compliance with a provision of the sub-contract requiring the material and labor furnished by the sub-contractor to be satisfactory to the architect.

What claim for alleged extra work performed by the sub-contractor should be disallowed, where neither the principal contractor nor the architect admitted it to have been extra work, but insisted that it be done as part of the work called for by the contract, considered.

APPEAL by the defendants, the John H. Parker Company and others, from a judgment of the Supreme Court in favor of the defendants, Albert Oliver and Cornelius A. Burr, doing business under the firm name of Oliver & Burr, entered in the office of the clerk of the county of New York on the 14th day of May, 1903, upon the report of a referee.

Joseph Fettretch, for the appellant John H. Parker Company.

Henry Schoenherr, for the respondents.

INGRAHAM, J. :

The question presented upon this appeal involves the right of the respondents, defendants, to recover from the appellants, defendants, the balance due upon a contract made for plastering a building which was in course of erection by the appellants for the city of New York. The respondents filed a lien against the amount due to the appellants from the city, and the appellants subsequently gave the bond upon which the lien was discharged; and the question presented is as to the right of the respondents to recover from the appellants the balance due upon the contract.

The answer of the respondents, which was served upon the appellants, alleges a complete performance of the contract. All of the issues in the action were referred to a referee, and after one of the respondents had been called as a witness and it appeared that they

had not fully performed their contract, an application was made to the referee to amend the answer by setting up that the contract had been performed, with certain exceptions specified, of which performance was waived by the appellant. This amendment was allowed, to which the appellants excepted, claiming that the referee had no power upon the trial to allow such an amendment. There was no claim of surprise. The case was on trial before a referee. The amendment was made when the respondents offered their proof, and it is not claimed but that the appellants had ample opportunity at subsequent sessions of the reference to meet the case presented by the respondents.

We think the referee had power to allow the amendment. The action is upon a contract by which the appellants agreed to pay to the respondents a sum of money for furnishing the material and doing certain work in the construction of this building. Whether the right to recover was based upon a complete performance of the contract or a performance with the exception of certain particulars the performance of which was waived by the appellants, did not change the cause of action for which a recovery was sought. The cause of action was still upon the contract, to recover the amount due under it. The court has power to allow an amendment upon the trial where the amendment does not substantially change the cause of action to which the amendment relates; and as this cause of action was not at all changed by the amendment, there can be no doubt, we think, but that it was within the power of the referee to allow it.

By the contract which is the basis of this cause of action, the respondents agreed "to furnish the materials for and do all the lathing and plastering work shown on plans and called for in the specifications necessary to complete the building known as Museum Building & Power House in Bronx Park, N. Y. * * *. All the materials and labor to be satisfactory to R. W. Gibson, Architect, and John H. Parker Company;" and the respondents further agreed to do all necessary cutting, drilling and patching in connection with other mechanics, and to remove from the premises, from time to time as directed, all dirt and rubbish caused by their work, and for this the appellants agreed to pay the sum of \$15,700. The contract between the appellants and the city specified the plastering

to be done, and it was the necessary plastering called for by this contract that the respondents agreed to do and for which they were to be paid. After the respondents had completed their work and the contract between the appellants and the city had been completed by the appellants, the architect gave the appellants a certificate which in effect stated that the work called for by the contract with the city had been performed as required by the contract and in a satisfactory manner, and under it the appellants received from the city the contract price. We think that this was a sufficient compliance with the provisions of the contract between the appellants and the respondents as to the approval of the architect, and that the respondents were entitled to recover, subject, of course, to proof that the portions of the contract not performed by the respondents had been waived by the appellants, or that the work had been accepted by them as a complete performance of the contract.

The only serious question presented is as to the correctness of the allowance made by the referee for the uncompleted work and for what was alleged to be extra work. The referee disallowed several claims made by the respondents for extra work; but as there is no appeal by the respondents from the judgment, the correctness of the finding of the referee in this respect need not be considered. The referee found that prior to the filing of their notice of lien, the respondents had substantially performed their contract, except in certain particulars as to which performance was waived by both the appellants and the city; that the respondents were compelled to do extra work and furnish some extra materials in and about the work which they were required to do by their contract, which extra work and materials were rendered necessary by the acts and facts for which the John H. Parker Company was responsible as between them and the respondents. The referee then allowed the contract price, also for certain extra work which was admitted by the appellants, and for certain extra plastering caused by defective brick work and construction, or made necessary by water or frost, aggregating \$403.30. For this sum of \$403.30 I do not think the appellants are responsible. The allowance is based upon the testimony of one of the respondents, and it was claimed that this extra plastering was made necessary by the imperfect manner in which the brick

work or the columns for the building had been constructed, and other faults in construction which required more plastering than the respondents considered they were bound to furnish. But by the contract the respondents were to do all plastering required to complete the building, and the claim of the appellants was that the respondents were required to do this work under the contract, and that in pursuance of that claim they did the work. One of the respondents testified in relation to this work: "I called Mr. John H. Parker's attention to it, Mr. Charles Parker's attention to it, Mr. Brooks' attention to it, and claimed that it was not right to ask me to put on that much mortar, and I refused to do it, and I worked back from that point. Afterwards I was obliged to do it. * * * I was obliged to do it on orders from the Parker Company and orders from the architect, and always a club held by contractors that they will hold your payments up if you do not do as they want." By the contract the respondents were required to obey the orders of the architect as to the work that they were to do, and having done it as work to be done under the contract, considering the form of the contract and specifications, they cannot now claim that it was extra work that they were not required to do under the contract. It is not claimed that the respondents were ordered to do this as extra work by either the appellants or the architect, but that they were required to do it as a portion of their work under the contract, and they acquiesced in that and did the work. The contract itself requires that the respondents should do all the plastering to be done in the construction of this building. I can find no provision in either the contract between the appellants and the respondents, or that between the appellants and the city, which allows the respondents to claim as extra work the plastering that was made necessary by the construction of the building. I think, therefore, that this claim for \$403.30 should be disallowed.

An examination of the testimony does not show that the respondents were entitled to a greater allowance than that made by the referee. The appellants insist that the respondents should not be allowed to recover under the contract, as the referee has found that they did not entirely complete the contract. But the respondents did the work, the appellants accepted that work and presented it to the city as a compliance with their contract with the city, received

the certificate of the architect that their contract had been performed, and received from the city the contract price which the city was to pay for a performance of their contract. Under such conditions the contractor, who has accepted the work of his sub-contractor, and upon that has obtained a certificate from the architect that the main contract was completed, and received the contract price, is not in a position to say that the sub-contract was not completed in accordance with the terms and specifications of the original contract. It is true that the original contractor would not be required to pay his sub-contractor unless the latter could prove a substantial compliance with the contract; but upon proof of a substantial compliance so far as the same was insisted upon by the original contractor, with an allowance for such of the work as, with the acquiescence of the original contractor, was omitted, no injustice is done and no rule of law prevents a recovery. There was evidence in this case to sustain the finding of the referee that a complete performance of this contract by the respondents was waived, or that the changes that were made were made under conditions which would justify a finding that they were consented to by the appellants, and the appellants were amply protected by the allowance that was made for the work that was not completed.

We think, therefore, that the judgment should be modified by reducing the judgment as entered to the sum of \$3,647.84, and as thus modified it should be affirmed, without costs of this appeal.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Judgment modified by reducing judgment as entered to the sum of \$3,647.84.

In the Matter of the Application of the Administrators of the Goods, Chattels and Credits of GEORGE F. GILMAN, Deceased, for Leave to Compromise with HELEN POTTS HALL her Claim against the Estate of GEORGE F. GILMAN, Deceased.

CAROLINE G. REDINGTON, Appellant; THEOPHILUS GILMAN and EDWARD L. NORTON, as Administrators, etc., of GEORGE F. GILMAN, Deceased, Respondents.

Power of an executor to compromise a claim against his testator's estate — the Surrogate's Court may authorize it — when a payment of \$60,000 to settle a claim for an entire estate of \$2,000,000 is proper — appeal from a surrogate's order — in order to bring up the facts for review the notice should show an intention to do so.

Independent of statute, an executor or administrator has the power to compromise and adjust claims made either against or in favor of the estate represented by him; the only risk which he assumes in so doing is that unless his action in this respect is sustained by a court having jurisdiction of the subject-matter, he will be subjected to a personal liability.

Section 2719 of the Code of Civil Procedure as amended by chapter 686 of the Laws of 1893, providing: "The surrogate may authorize the executor or administrator to compromise or compound a debt or claim on application and for good and sufficient cause shown," confers upon a surrogate the power to permit an executor or administrator to compromise and compound a claim against the estate.

Under what circumstances it is proper for a surrogate to authorize the administrators of an estate amounting to nearly \$2,000,000 to compromise for \$60,000 a claim presented against the estate for the entire amount thereof, considered.

Semble, in view of the provisions of the Code of Civil Procedure allowing an appeal from a decree or order of the Surrogate's Court to be taken upon questions of law or upon the facts, and conferring on the appellate court, if the appeal is taken on the facts, the same power to decide the questions of fact which the surrogate had, that an appeal from an order or decree of the Surrogate's Court will be treated as one upon questions of law unless the notice of appeal contains a statement that the appellant desires to review the facts.

APPEAL by Caroline G. Redington from an order of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 22d day of January, 1904, permitting the respondents to settle a claim against the estate of George F. Gilman, deceased.

Raphael J. Moses, for the appellant.

William R. Wilder, for Edward S. Percival, in support of the appellant.

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T. S. Ormiston, for the respondent Gilman as administrator.

John J. Crawford, for the respondent Norton as administrator.

McLAUGHLIN, J.:

This appeal is from an order of the Surrogate's Court of the county of New York permitting the administrators of the estate of George F. Gilman, deceased, to compromise and settle a claim made against it by one Helen Potts Hall.

The appellant attacks the validity of the order upon two grounds: *First*. That the Surrogate's Court did not have the power to make the order, and, *second*, if it did, it was improperly exercised. These questions will be considered in the order raised.

First. It must be conceded that a Surrogate's Court is a court of limited jurisdiction, and has only such power as is conferred upon it by statute. (See Code Civ. Proc. § 2472.) In determining the question, therefore, resort must be had to the statute, and unless such power has been there conferred, either in express words or in words from which an inference can fairly be inferred, then this order is wrong and must be reversed. In this connection, however, it must be borne in mind that an executor or administrator, independent of a statute, has the power to compromise and adjust claims made either against or in favor of estates represented by him—the only risk he assumes in doing so being that unless the surrogate or a court having jurisdiction of the subject-matter thereafter sustains his acts, he will be subjected to a personal liability. (*Chouteau v. Suydam*, 21 N. Y. 179.) The first statute bearing upon the subject which I have been able to discover is chapter 80 of the Laws of 1847. Section 1 of this act permitted a surrogate to authorize executors and administrators to compromise or compound any debt or claim belonging to the estate of their testator or intestate but not a claim against it. This section, however, was amended in 1888 (Chap. 571), by which act the surrogate was granted power to authorize executors and administrators “to compromise or compound any debt or claim,” and while it might be argued with some force that this language was sufficient to confer power upon the surrogate to authorize the settlement of a claim made against the estate, it probably was not so intended—at least it is not sufficiently clear that such was the intent, when the whole act is con-

sidered, as to justify the court in thus construing it. But whatever doubt may have existed in this respect prior to 1893 was removed by the passage of chapter 100 of the laws of that year, by which section 1 of the original statute of 1847 as amended in 1888 was further amended by adding the words: "Or to compromise or compound any debt or claim owing by the estate of their testator or intestate." The words thus added, taken in connection with the other words used, clearly and unmistakably indicate an intent upon the part of the Legislature to confer power upon the surrogate to permit a settlement or compromise of a claim either made for or against the estate. But it is said that chapter 100 of the Laws of 1893 was repealed by chapter 686 of the same year. This is undoubtedly true, but in repealing the original statute of 1847 and the amendment of 1888 the amendment which was thereby added to section 2719 of the Code of Civil Procedure evidences, as it seems to me, that the Legislature intended to continue the power which had theretofore been conferred upon the surrogate with reference to a settlement or compromise and not to diminish it. The section of the Code as thus amended is entitled "Payment of debts." It provides that every executor and administrator must proceed with diligence to pay the debts of the deceased according to the order therein stated; prohibits preferences for the payment of a debt over other debts of the same class; makes provision for the payment of debts not due as well as those already accrued; prohibits executors and administrators from paying debts due to themselves until proved to and allowed by the surrogate, empowers him to give preferences to rents due and accruing on leases held by the testator or intestate at the time of his death, and then provides: "The surrogate may authorize the executor or administrator to compromise or compound a debt or claim on application and for good and sufficient cause shown." These words, when the section is properly construed, as it seems to me, include claims made against the estate. It is with such claims that the section is dealing, and I do not think what follows the words quoted, "and to sell at public auction, on such notice as the surrogate prescribes, any uncollectible, stale or doubtful debt or claim belonging to the estate," destroys that effect or evidences contrary legislative intent. The meaning to be ascribed to the word "debt" is not uncertain. The Legislature has indicated that as

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thus used it includes *every* claim and demand upon which a judgment for a sum of money, or directing the payment of a sum of money, could be recovered in an action. (Code Civ. Proc. § 2514, subd. 3.)

Considering, therefore, the history of the legislation bearing on the subject, which has all finally culminated in section 2719 of the Code, and the evident purpose to be accomplished by that section, it seems to me the Legislature intended to confer power upon a surrogate to permit a settlement and compromise of any claim, whether it be for or against the estate.

If I am right in this conclusion, then it necessarily follows that the Surrogate's Court had power to make the order appealed from, and this naturally leads the consideration of the other question, and that is, whether such power was properly exercised. It may well be doubted whether the appellant is in a position to raise this question, inasmuch as the appeal is simply "from the order," and no statement is contained in the notice to the effect that the facts considered by the surrogate are sought to be reviewed. The Code provides that in certain cases a party aggrieved may appeal from a decree or from an order of a Surrogate's Court (§ 2568), and that the appeal may be taken upon questions of law or upon the facts, or both (§ 2576), and that if taken upon the facts, the appellate court has the same power to decide the questions of fact which the surrogate had, and may, in its discretion, receive further testimony or documentary evidence and appoint a referee (§ 2586). In view of these provisions, it would seem that if the appellant desired to review the facts the notice of appeal should contain a statement to that effect, and in the absence of such statement the appeal would be considered only as upon questions of law. The conclusion, however, at which we have arrived renders it unnecessary to determine this question at this time. Assuming, therefore, without deciding, that the question is before us, I think the power of the surrogate was properly exercised. The Gilman estate amounts to nearly \$2,000,000. Mrs. Hall claims she is entitled to the whole of it under an agreement made with the intestate, and she has brought an action in the Supreme Court of this State to establish her claim. A demurrer was interposed to her complaint upon various grounds, which was overruled by the Special Term, and on appeal to this court the same was affirmed (*Hall v. Gilman*, No. 1, 77 App. Div. 458).

This action is still pending. In addition to this, a similar action has been commenced by her in the State of Connecticut, a third action in the State of New York, in which is involved the sum of \$14,200, deposited in court, which she claims belongs to her under the agreement referred to, and there is a fourth action pending in the United States Circuit Court of Appeals for the second district from a decree rendered against her in an action brought to recover upon a check for \$10,000 alleged to have been made and delivered to her by the intestate. The petition of the administrators asking for permission to compromise with Mrs. Hall sets out that her entire claims can be settled and compromised for the sum of \$20,000 in cash and 400 shares of the Great Atlantic and Pacific Tea Company of the value of \$40,000; in other words, her entire claim can be settled for \$60,000. Considering the uncertainty of litigation, the amount involved, and that it has been determined by this court that the complaint served by her in the action to recover the entire estate sets out a cause of action, the settlement would seem to be not only justifiable but very desirable. By making the settlement a large portion of the estate can be at once distributed among those entitled thereto, while, on the other hand, to refuse permission to compromise prevents a distribution of the assets and involves the estate in litigation, the expense of which will necessarily be quite large. It also appears from the petition that Mrs. Hall resided in the intestate's home for some time prior to his death, enjoyed his friendship and confidence, performed various services in and about his household, was familiar with his affairs, and that if the settlement be made such information will be placed at the disposal of the administrators to be used as they see fit in contesting another claim which has been presented against the estate. The fact that Mrs. Hall has agreed to furnish this information is a mere incident of the compromise and not the basis of it, and, therefore, is not subject to the criticism placed upon it by appellant's attorney.

I am of the opinion that the order appealed from should be affirmed, with ten dollars costs and disbursements to the administrators respondent, payable out of the estate.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and HATCH, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements to the administrators, payable out of the estate.

CHARLES L. SPIER, Respondent, v. CHARLES L. HYDE and WILLIAM R. GARRISON, Appellants.

False representations by one of three persons engaged in a joint adventure — when they relate to existing facts and not to expected events — when the relations between the parties are of a fiduciary character — what constitutes a breach of such fiduciary obligation — effect of an agreement by which two of the associates were authorized to make changes and modifications in the contract.

Charles L. Spier, at the request of Charles L. Hyde and William R. Garrison, secured options on 10,100 shares out of a total of 20,000 shares of the stock of the Goodson Type Casting and Setting Machine Company. Hyde and Garrison paid for the stock on which the options were obtained at the rate of \$10 and \$11 per share. Thereafter, in February, 1899, Spier had a conversation with Hyde relating to the compensation which the former was to receive in connection with the venture. After the matter had been discussed, Hyde wrote out the following memorandum :

"10,100 shares in the pool.

O. K. H.

5,100 H. and G.

O. K. S.

5,000

250 Chas. L. Spier.

4,750 at 22½ — about \$106,875.

"H. & G. receive \$106,000.

"Spier receives 250 shares of stock in the pool.

"Now, if we sell the stock above 22½, Mr. Spier will be entitled to receive the difference between 22½ and 27, to be taken in stock at 22½ per share. If we sell at over 27, then profits to be equally divided between Garrison, Spier & Hyde." This memorandum was O. K.'d by Hyde and Spier.

It was subsequently concluded that the 10,100 shares of stock could be used to better advantage by the formation of a new corporation to take over the stock and property of the Goodson Type Casting and Setting Machine Company. Spier, on being consulted, agreed to this proposition. A contract was thereupon, on March 27, 1899, entered into between the parties, which provided, "The new company may be called the Goodson Graphotype Company, and it is our intention to exchange 10,100 shares of its stock for an equal number of shares of the Goodson Typecasting & Setting Machine Company. We expect to place this 10,100 shares of stock of the Graphotype Company (i. e., the new company) in portions from time to time in a pool to be charged to the pool at the rate of \$22.75 per share."

The contract then expressed the hope that the stock would be underwritten or sold and if such expectation were realized to reserve a part of the money obtained from such sources as working capital and to defray expenses. It further provided that the profits upon the 10,100 shares in the pool would be estimated as the net sum realized upon the sale of the stock after deducting the

\$22.75 per share and expenses, and "after deducting further whatever sum of money those depositing stock in the pool may desire to reserve" for the use of the company as working capital. It was then provided that all questions relating to modifications or change were to be determined by Hyde and Garrison; that in consideration for Spier's services and of his agreement to devote his entire time to the promotion of the new company, there should be set apart for him as full compensation fifteen per cent upon whatever net profits might be found to have been realized by the sale of the pooled stock "after the entire 10,100 shares have been pooled and sold."

It further provided: "It is understood, however, that this 15% interest relates only and applies solely to the 10,100 shares of stock of the new company and to the net profits, if any, to be derived from the sale thereof on the basis as above stated."

May 6, 1899, Hyde made an agreement with a firm of bankers reciting the intention of Hyde and his associates to form a corporation for the purpose of acquiring the capital stock and the patents of the Goodson Type Casting and Setting Machine Company, and providing that the bankers would, on or before May 23, 1899, if their examination of the patents proved satisfactory, purchase from Hyde 10,000 shares of the preferred stock and 10,000 shares of the common stock of the new company; that the new company was to have 25,000 shares of preferred stock of the par value of \$100 each and 25,000 shares of common stock of the par value of \$100 each; that the new company was to issue to Hyde 24,999 shares of preferred stock and 25,000 shares of the common stock, for which Hyde was to deliver to the new company the 10,100 shares of stock of the old company and \$374,000 in cash; that Hyde was to procure, by purchase or exchange, all of the balance of the stock of the old company, amounting to 9,900 shares, and to transfer it to the new company, and that for each share of stock of the old company Hyde was to receive of the amount issued to him by the new company one share of preferred stock and one share of common stock; that in the event that Hyde was unable to acquire all of the stock of the old company by the 4th of September, 1899, he should on that date return to the new company the amount of common and preferred stock to which he was not entitled under the contract. It was further provided that on or before the 31st day of May, 1899, Taylor & Co. would pay to Hyde, in the event that their examination of the machinery and patents owned by the company were satisfactory, the sum of \$187,500 on account of 10,000 shares of preferred and 10,000 shares of common stock of the new company, purchased by them from Hyde, and that the remaining \$562,500 on account of such purchase was to be paid by Taylor & Co. to Hyde in three equal installments, payable July 1, 1899, September 1, 1899, and November 1, 1899, and that Hyde was to deposit in a trust company 10,000 shares of the preferred stock and 10,000 shares of common stock, to be held by the company for one year from the date of the agreement, and not to be sold within that time.

On May 8, 1899, after the contract with the firm of bankers had been entered into, Hyde represented to Spier that the profits of the pool were about 2,475 shares, and, in reliance upon this representation, Spier, on that date, executed

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an agreement that his compensation should be estimated on that basis. Spier was ignorant of the making of the contract with the firm of bankers or of the extent of the profits realized from the pool, and Hyde did not make a full disclosure of the situation to him.

The new corporation was subsequently organized, and Hyde and Garrison received profits therefrom largely in excess of the amount represented to Spier. In an action brought by Spier against Hyde and Garrison to obtain an accounting with respect to the 10,100 shares of pooled stock, it was

Held, that by the agreement executed between Spier and Hyde in February, 1899, Spier secured the same title to the 250 shares allotted to him as Hyde and Garrison had to the remaining stock in the pool;

That whether the relation created between the parties by this agreement was a technical partnership or a mere joint venture was of no consequence, as, in either case, the same legal rules would be applicable;

That the relation created between Spier and Garrison and Hyde was fiduciary in character, and imposed upon Garrison and Hyde the duty of exercising the most scrupulous good faith towards Spier and entitled the latter to maintain an action in equity for an accounting with respect to the property so held;

That the fiduciary relation existing between the parties was not changed by the contract of March twenty-seventh, and that they owed Spier the duty of carrying out the terms of this contract so as to protect his interests;

That while the contract empowered Hyde and Garrison to make changes and modifications in the contract, they could not do so at the expense of the plaintiff without obtaining his consent after making a full disclosure of the situation;

That, under the agreement of March 27, 1899, Spier was entitled to fifteen per cent of all profits derived from the 10,100 shares of the stock of the old company independent of the form which such shares of stock assumed or of the manner in which the profits were derived from their use;

That Hyde and Garrison could not swell the volume of stock to be issued by that new company and then claim that Spier's rights were confined to an interest in 10,100 shares of the stock of the new company;

That at the time the contract of May 8, 1899, was executed by Spier, the fiduciary relation between the parties still existed;

That the representations made by Hyde, which induced Spier to execute that contract, related not to expected events, but to existing facts;

That in making such representations and in failing to disclose the situation, Hyde and Garrison were guilty of a breach of their fiduciary obligation to Spier, and that, for these reasons, the contract of May eighth was not binding upon Spier.

INGRAHAM, J., dissented.

APPEAL by the defendants, Charles L. Hyde and another, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 3d day of July, 1903, upon the decision of the court,

rendered after a trial at the New York Special Term, directing an accounting by the defendants of certain stocks.

Franklin Bartlett, for the appellants.

H. Snowden Marshall, for the respondent.

HATCH, J.:

There was a former appeal in this case from an interlocutory judgment entered therein in favor of the plaintiff and against the defendants, and upon such appeal the judgment was reversed (78 App. Div. 151). In the opinion there written the substance of the pleadings forming the issue between the parties was stated, and also the principal contracts relied upon by the parties were set out in full in their pleadings, and considered by the court in making disposition of the appeal. It is not necessary, therefore, that the issues be stated herein in detail, or that the contracts be again set out in full. The issues upon the trial, save in one respect which is not controlling in the disposition of this appeal, are the same as they were before. The contracts relied upon which determine the rights of the parties are the same, and we have now to consider whether the construction placed upon the principal contract by the learned court below is correct, and whether the effect given to the testimony can be sustained. In this view, it becomes necessary to call attention to the exact relations which existed between the plaintiff and the defendants at the time of the inception of the enterprise, resulting in the claims that are made in this action.

At the instance and request of the defendants, the plaintiff procured options on 10,100 shares of stock, being a controlling interest in the Goodson Type Casting and Setting Machine Company, a corporation organized under the laws of the State of Minnesota. When the plaintiff entered upon the business of procuring options upon this stock, it was with the understanding between himself and the defendants that he was to give his services in connection therewith free of charge, and the defendants were to furnish the money to pay for the stock when the options should be obtained. This agreement was oral, was carried out, the plaintiff obtained the options, and the defendants paid therefor at the rate of ten and eleven dollars a share for the stock so obtained. In February, 1899,

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after the options were secured, plaintiff and the defendant Hyde had a conversation relating to the interest as compensation which the plaintiff should receive in connection with the venture. After the matter had been discussed, the defendant Hyde wrote out the following memorandum, which was O. K.'d by Hyde and the plaintiff at the time :

“ 10,100 shares in the pool.

O. K. H.

5,100 H. & G.

O. K. S.

5,000

250 Chas. L. Spier.

4,750 at 22 1/2 — about \$106,875.

“ H. & G. receive \$106,000.

“ Spier receives 250 shares of stock in the pool.

“ Now, if we sell the stock above 22 1/2, Mr. Spier will be entitled to receive the difference between 22 1/2 and 27, to be taken in stock at 22 1/2 per share. If we sell at over 27, then profits to be equally divided between Garrison, Spier & Hyde.”

This conversation and the preparation of this writing by the defendant Hyde are undisputed. It is to be observed that by the provisions of this writing the 10,100 shares of stock were to be pooled, and of these shares in the pool the plaintiff's interest was 250 shares. The unit of value for this stock was fixed at twenty-two dollars and fifty cents per share, which sum was first to be accounted for to the pool. If the pool stock upon a sale sold for twenty-seven dollars, then the plaintiff was entitled to receive the difference between such sums upon his shares. If the stock sold above twenty-seven dollars, then the profits upon the whole were to be equally divided between the plaintiff and the defendants. It is evident from this arrangement that Spier's direct interest in the pool at that time was in the 250 shares of stock, coupled with a contingent interest in the whole; the defendants' interest was in the remainder, subject to plaintiff's contingent interest. Under this arrangement, therefore, the plaintiff's interest was in a specified number of shares of stock. He owned those shares for the services which he rendered, and the defendants owned the remaining shares of the pool stock for the money which they advanced or which was

to be advanced. The stock at this time had not come into the possession of any of the parties in interest. It was represented by the options which the plaintiff had obtained. Subsequently, the 10,100 shares of stock were taken in the name of the plaintiff. He, however, never had actual possession of these shares, as physically they came to the hands of the defendant Hyde. The plaintiff executed an assignment of the shares of stock either to Hyde or the defendants, and Hyde retained possession of them. The intention of the parties at this time, so far as it was expressed in this memorandum, was to sell these shares of stock at an advance, reap the profits on the terms prescribed and make the division based upon the prices obtained. If the transaction had stopped here, it is quite evident that the plaintiff would be regarded as the owner of the 250 shares of stock, as that was the apportionment under the arrangement. He had the same title to his 250 shares that the defendants had to the remainder, and upon a sale of the same, or other disposition being made, he could enforce his right to the 250 shares, and to whatever profit was made in the whole number of shares above twenty-seven dollars per share. In the disposition, however, which was made of this stock, the defendants were to have a controlling voice based upon the fact that they furnished the money with which to make the purchase. The relation, however, which was thus created between the plaintiff and the defendants was joint in interest.

Whether it became a technical partnership as a matter of law, or whether it constituted a mere joint venture is not of consequence. The respective interests were settled. Such interests were placed in a common pool, to be used and disposed of for the benefit of all, and the legal rules applying to such an agreement are precisely the same as are those which apply to a partnership in technical sense, and rights are to be enforced upon the same principles. (*King v. Barnes*, 109 N. Y. 267; *Marston v. Gould*, 69 id. 220.) Such relation is fiduciary in character, and the most scrupulous good faith in dealing is required at the hands of the party who has been invested with the power to deal with the property, and in equity he may be called upon to account for the property so held. He becomes a trustee for his associates in interest, is their agent in the transaction and is not only bound to account for the property and

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its proceeds, but the burden is imposed upon him to show that he has discharged his trust with fidelity. (*Marvin v. Brooks*, 94 N. Y. 71.) It is of small consequence that the language used in conferring power to deal with respect to the property intrusted to the hands of the trustee is broad to the extent of permitting him to deal with it as he chooses. It does not discharge him from the obligation of good faith in dealing; nor is he discharged from fairly accounting for all he received, or from protecting the rights and interests of the associates whom he represents. Rather is his obligation increased thereby. It confers upon him no arbitrary power to deal with the property without regard to the rights and interests of his associates, for the relation being fiduciary he is not only under a moral, but also under a strict legal obligation to act in good faith, and to fulfill the trust committed to his care with complete fidelity.

In process of development it was concluded by the parties that the 10,100 shares of stock could be used to better advantage by the formation of a new corporation, which should enter into a contract with the Minnesota corporation and take over, so far as possible, its stock and holdings. The capital stock of the Minnesota corporation was 20,000 shares. The 10,100 shares, upon which the plaintiff held options, were, therefore, the controlling interest. The defendants, however, after the agreement heretofore mentioned, did not own a controlling interest of such corporation. Plaintiff's holding was absolutely essential to the carrying out of the scheme to form a new corporation, which they would be able to control in its creation, and in dealing with the Minnesota corporation, and thereby be enabled to dictate the terms upon which such corporation should be formed, so far as the statute of the State of New Jersey permitted. It is, therefore, plain that the plaintiff was an essential factor in the success of such scheme, and the shares allotted to him were necessary to go into the common pool in order to make it a success. The defendants recognized this condition, and, therefore, made the proposition to the plaintiff, contained in the letter, called the contract of March 27, 1899. This contract superseded the prior arrangement in February, and, undoubtedly, whatever rights the plaintiff now has, which may be enforced by action, are to be determined by a construction of this contract. The contract itself, how-

ever, did not disturb the relations which existed between the plaintiff and the defendants. The defendant Hyde was the active manager and manipulator. He was, in legal effect, the agent and trustee for his associates, and so remained under this contract, and continued so to remain during the whole course of the dealings in the execution of the proposed plan. Whatever views Mr. Hyde may have held with respect to the duties and obligations which he owed to the plaintiff, and whatever the powers of which he conceived himself to be possessed by virtue of the contract, he recognized the fact that Garrison and Spier were his associates after the contract was executed, and so testified. This relation, however, is not of special significance in construction of the contract of March twenty-seventh. As to that contract the plaintiff was informed concerning it, accepted its terms, and no claim is made that he was misled as to its conditions, or that he was not at that time fully informed concerning his rights.

It must be borne in mind, in considering the contract, that plaintiff was the owner of 250 shares of stock, and that he had a contingent interest in the remainder of the shares owned by the defendants. This interest made him a necessary party to the reorganization, and it was so recognized by the defendant Hyde, for after reciting an intention, if the patents proved satisfactory, to form a corporation, he states: "We should like to have your assistance." And again: "If you join us" a provision would be made for profits. It cannot be questioned but that this contract provides for the placing of the 10,100 shares of stock then owned by the pool. The agreement so recites, and that such stock was to be charged for at the rate of twenty-two dollars and seventy-five cents per share, which was an advance of twenty-five cents a share over the agreement made in February. It then expressed the hope to have the stock underwritten or sold, and, if such expectation were realized, to reserve a part of the money from such source as working capital and to defray expenses. If the plaintiff joined in this proposal the contract provided that the profits upon the 10,100 shares, if pooled, would be estimated as the net sum realized upon the sale of the stock, after deducting the twenty-two dollars and seventy-five cents per share and expenses, and "after deducting further whatever sum of money those depositing stock in the pool may desire to reserve,"

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for the use of the company as working capital. The contract then provides that all questions relating to modifications or change were to be determined by the defendants. And as consideration for the plaintiff's services in the matter, and in consideration of his subsequent devotion of his entire time for the promotion of the new company, there would be set apart for him, as full compensation, viz., his stock and his services, fifteen per cent upon whatever net profits may be found to have been realized by a sale of the pooled stock, "after the entire 10,100 shares have been pooled and sold." Down to this point in the contract it is plain and unambiguous, and it gave to the plaintiff in terms fifteen per cent of the whole of the net profits of the venture, after deducting the price of the stock at twenty-two dollars and seventy-five cents per share, the expense of promotion and the setting aside of a working capital. There is not a syllable in this contract which refers to any stock to be issued by the new company except as there is the expression of intention hereafter noticed. The whole subject-matter of the arrangement related exclusively to the 10,100 shares of the Minnesota corporation, which had theretofore been pooled, and it was of profits in relation to that 10,100 shares of stock which should be made that the plaintiff was to receive fifteen per cent in consideration of the transfer of his stock and the rendition of his services. Then follows the clause: "It is understood, however, that this 15% interest relates only and applies solely to the 10,100 shares of stock of the new company and to the net profits, if any, to be derived from the sale thereof on the basis as above stated." At first reading this clause appears to be a positive, distinct limitation of the plaintiff's interest to 10,100 shares of stock of the new company. It is to be observed, however, that such is not its entire language or meaning. Plaintiff's rights cannot be construed solely from this clause of the contract, for by its terms it refers to the preceding provisions of the contract and makes the profit upon the number of shares of stock to rest upon the basis stated therein; consequently resort must be had to that basis in order to arrive at a correct conclusion. The preceding provisions of the contract are: "The new company may be called the Goodson Graphotype Company, and it is our intention to exchange 10,100 shares of *its* stock for an equal number of shares of the Goodson Typesetting & Setting Machine Company.

We expect to place this 10,100 shares of stock of the Graphotype Company (*i. e.*, the new company) in portions from time to time in a pool to be charged to the pool at the rate of \$22.75 per share." It thus appears that the intention thus expressed in the letter, which contained the proposal, and, therefore, the basis for the contract, that the 10,100 shares of the old stock should be exchanged for 10,100 shares of the stock of the new company on precisely the same basis as to value as the stock of the old company, and it was that stock received in the exchange which was to be pooled at the same rate. It is quite evident that if the stock of the old company was to be used entirely in exchange for an equal number of shares of stock of the new company and there were no more shares of stock of the new company issued, then there would be no exchange of value, but simply an exchange of securities, representing the same value; so that there would be simply the exchange of securities of the pool, and the profits were to be based and paid upon what was realized from this stock as pooled. If that scheme were carried out, therefore, whatever profits, either in the form of stock, or cash, or otherwise, which arose by reason of the use of the pooled stock of the old company, it was to have equal representation in all respects in the same number of shares of the stock of the new, and it was upon this basis that the limitation in the contract was made of the plaintiff's fifteen per cent. So that in any event, no matter what it was called, or what mutations the 10,100 shares of the stock of the old company underwent, its equivalent in value was to be represented by securities which were taken in exchange, and it was upon that basis that plaintiff's fifteen per cent of the profits was reserved. Such intention was not carried out. The defendants were not obligated to carry out that particular plan, as the contract contained a provision authorizing modification and change by the defendants, and this related to the terms of the sale of the pool stock, and to the reservation of proceeds for expenses, and in modification and changes in plan. Undoubtedly, there was given this right in the broadest terms, but such right could not be exercised in such form and manner as to deprive the plaintiff of his property or of the interest which he was to receive. There were no 10,100 shares of stock of the new company exchanged for 10,100 shares of stock in the old company. On the contrary, the last-men-

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tioned stock was made the basis for the whole issue of stock by the new corporation. It paid expenses, it provided a working capital, it resulted in profits to a very large amount, and the defendants seemed to have reaped from the transaction what would be to modest men a handsome fortune. Consequently, no construction of this contract ought to be adopted which deprives this plaintiff of the benefits which were represented by the property which he owned, the arrangement which he made and the contract which he signed. The defendants could not by change and modification manipulate the 10,100 shares of stock by a different method from that represented in the contract, and then exclude the plaintiff from profits based upon a consideration of an equal number of shares of stock, much lessened in value by reason of the amount of the issue, and say that the separation of an equal number of shares, nominally of the same value, would answer its requirements. In the fulfillment of this contract, the relation which the defendants bore to the plaintiff was fiduciary in character, and they owed him a duty of carrying out the terms of this contract so as to protect his interest. If they made changes and modifications they could not make them at the expense of the plaintiff without his consent, given upon a full disclosure of all the facts. While they might make modifications and changes in broadest form, yet they were required, in making such modifications and changes, to protect the plaintiff's property interest in the subject-matter, and so that he might realize therefrom the equivalent of what he would have realized had no change been made. It seems clear, therefore, that the fifteen per cent, which was to represent the plaintiff's interest under the proposed scheme, was fifteen per cent of the value of the 10,100 shares of the old company and the contemplated exchange of this stock was for stock of the new company, equal in value to the stock of the old, and the defendants could not, by modification and an increase of capital stock, swell the volume to be issued and then determine plaintiff's rights thereunder, based upon an equivalent number of shares of the new company. We are of opinion, therefore, that the last clause of the contract must be construed in connection with the facts, as they existed prior to the time when it was made, of the contemplated scheme expressed in its provisions and of the acts of the parties thereunder. Really, the question goes not so much to the construction of this contract,

but rather to the manner and method of its execution. If it had been carried out, as proposed, plaintiff's fifteen per cent would have been based upon the value of the stock of the old company, whether it was represented by it or its equivalent in the new. As executed, the shares of stock of the new company were very much reduced in value. But the stock of the old company was the basis for and represented all of the stock issue of the new. We are, therefore, of opinion that the construction placed upon this contract by the learned court below was correct.

It does not follow from this view, however, that the plaintiff is necessarily entitled to the judgment which has been rendered. It is conceded that on May eighth, after the contract between Talbot J. Taylor & Co.*—who were the underwriters of the issue of stock of the new corporation—had been executed, the parties hereto entered into another contract, which, in terms, defined the plaintiff's interest and the amount which he was entitled to receive, arising out of the whole transaction. If that contract were made by the defendants with the plaintiff after full and complete discharge of the duties which they owed to him, and without misrepresentation or fraud upon their part, then there is an end of this lawsuit, and the judgment appealed from cannot be sustained. In considering this branch of the case we must bear clearly in mind the relations which existed between these parties at the time when this contract was signed. That relation upon the part of the defendants still remained fiduciary in character and they were bound at that time to make full and complete disclosure of all of the facts connected with the transaction, and in dealing with the plaintiff they were bound to discharge the obligation of disclosure of existing conditions with scrupulous good faith and integrity. The plaintiff was then in the employ of the defendant Hyde and was in large measure subject to his control and direction. Mr. Hyde evidently believed that such relation upon his part did not require a full disclosure of all of the transactions, but only of such as he chose to make. Upon this subject the defendant Hyde was asked and answered: "Q. And you were the pool manager and owed him the duty of confidentially telling him everything that took place? A. No, I thought I could tell

*The substance of this contract is set out in the dissenting opinion of INGRAM, J., *post*, page 483.—[REP.]

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him what I chose. It is not my habit of telling my subordinates anything that I do unless I choose to do so. There are certain things that a man has to keep to himself. In this case I told Mr. Spier what I thought he ought to know." Both defendants testified that on the morning of the day when this contract was executed by the plaintiff that the defendant Hyde upbraided and scolded the plaintiff for dereliction of duty which he was employed by Hyde to perform, and for which he received a salary of fifty dollars per week. And it was after such upbraiding that he proposed the terms upon which the contract of May eighth was based. It is fairly disclosed by the testimony that the defendant Hyde occupied quite a different attitude to the plaintiff as an associate than to Garrison, his other associate. Between the two defendants there were evidently terms of equality in dealing and disclosure. The plaintiff was regarded as a subordinate, as he was in fact in employment and was deemed to be only entitled to such disclosure as the defendant Hyde saw fit to make regarding the transaction. From this relation there is some ground for saying that the parties did not at that time deal upon terms of equality, and this fact is to be taken into consideration in weighing the testimony which has convinced the trial courts that the defendants were guilty of misrepresentation. The plaintiff testified that at the time in question, and prior to the signing of the contract, the defendant Hyde stated to him that the profits of the pool were only about 2,475 shares, and that plaintiff's percentage of that would be about 361 and a fraction; that he was ignorant upon the subject, and that upon this representation he was induced to make the agreement. The plaintiff denied any knowledge of the contract which had then been made with Talbot J. Taylor & Co., and testified that at that time he did not know what were the profits of the pool, to which he was entitled, and that he accepted the defendant Hyde's statement as a truthful statement of his entire interest under the contract, and, relying thereon, entered into the contract of May eighth. If this representation was made at that time it constituted an untruthful statement of plaintiff's interest as provided for in the contract of March twenty-seventh, for, as we have seen, he was then entitled to fifteen per cent of the profits of the pool stock, and they were largely in excess of the number of shares of stock which the defendant Hyde claimed represented the entire pool interest, the

subject of division. At this time the defendants knew the condition and knew approximately what profits would result to them if the Taylor contract were carried out. It is also fairly disclosed by the evidence and the actions of the parties that at this time both defendants understood plaintiff's interest under the contract of March twenty-seventh and in the pool. The purpose of the meeting at this time was to arrange about the interest which plaintiff should receive, based upon the supposition that the Taylor contract would be fulfilled. It was testified by a disinterested witness, Williamson, that Mr. Hyde stated to him about noon of May eighth that by reason of the changed relations in the nature of the deal with Taylor & Co. "he had been obliged to squeeze or reduce the holding or share that Mr. Spier was to have in stock." Subsequently the witness modified this statement by leaving out Spier's name, who he would not testify was mentioned by name, but the witness distinctly understood that the squeezing out referred to Spier. The defendant Hyde was interrogated upon this subject and gave this version: "And you stated to Mr. Williamson you had thereupon concluded to squeeze Spier? A. I am not sure that any conversation occurred with Mr. Williamson that day. Mr. Williamson seemed to think that conversation did occur, but I am not clear that it did. I didn't tell Mr. Williamson that I was going to squeeze Spier. Q. Did you say that you had been obliged to squeeze or reduce the holding that Spier was to have in the pool? A. Mr. Williamson says that; I don't. I deny that I used those terms. I am not sure I made any such statement on that date. I am not sure I did not. I am quite positive that I did not tell him I was squeezing Mr. Spier. I am not absolutely positive, but I don't believe I did." This is far from a denial of Williamson's testimony, and its strong tendency is to lead the mind to believe that in the relations which existed between the defendants and the plaintiff his rights and interests were not cared for with that degree of fidelity which the relation and the law required. The conduct of the parties in respect to the transaction itself is open to suspicion. The defendant Garrison was notified by Mr. Hyde that he was going to have an important conversation with Mr. Spier, and he desired him to be within hearing distance, so that he might listen to what took place, and a stenographer in the office was directed to occupy a convenient place where

he could listen to what occurred, and this taken in connection with the inequality of relationship between the defendant Hyde and the plaintiff, with the fact, for I think it must be so accepted, that the plaintiff was to be squeezed or his holdings reduced, and were in fact reduced, and that all were directed to listen during the process, leads the mind to the conclusion that the plaintiff did not have that fair measure of protection which the law casts about him in his dealing with the defendants. And taking all these facts into consideration and the further fact that the plaintiff's profits under the agreement were reduced to the least possible amount, and that the defendants reaped from the same transaction a large and bountiful harvest, quite prepared the mind of the court for accepting the version of the transaction as given by the plaintiff, and in reaching the conclusion therefrom that the fact was that all the matters were not fully and fairly disclosed by the defendant Hyde at the time of this transaction, and thereby find that by failure of disclosure and by fraudulent representations that the contract of May eighth did not become a legal, binding contract upon the plaintiff, and that he is entitled to enforce his rights in this action.

It is said, however, that the representations, even if made by the defendant Hyde, were of future expectations and not of present facts, and that in any event the representations as to the value of the pooled interests were mere matter of opinion and could not by any possibility have been ascertained. The Taylor contract was a fact presently existing. The terms and provisions of that contract were the basis in respect of which the defendants were dealing. Each of them knew that if this contract was fulfilled approximately what they would obtain. It provided in express terms for the capital stock of the corporation, its issuance to the defendant Hyde what should be set apart for working capital and how it should be provided. The number of shares of stock was known, and the parties were adjusting their relation and rights in respect of its existence. It was quite true that the corporation had not been formed, and also true that the contract with Taylor & Co. was conditional, but the contract with the plaintiff was based upon the conditions which appeared in the Taylor contract, and those conditions were known and their future fulfillment was not a matter to which the representations related. For if the existing contract was not

carried out and fulfilled, then the contract which was made with the plaintiff on May eighth failed. It was made to depend thereon. So the representations with respect to which the parties were dealing were of present existing facts, although their binding obligation depended upon future events. The opinion expressed, if it could so be called, as to the number of shares which would be in the pool was based upon the facts as they then appeared, and the opinion was based upon a certainty, if only the contract should be carried out. The representation, opinion or statement which was made by the defendant Hyde was of a material fact then existing and established by the contract, and not a mere matter of opinion or the expression of an expectancy of what might occur. We reach the conclusion, therefore, that the fiduciary relation between these parties existed at the time of the contract of May eighth; that the representations then made by the defendant Hyde were not of expected events, but of existing facts; that the court was justified in finding that the defendants were guilty of a breach of their fiduciary relation, and that the representations claimed by the plaintiff to have been made were made and that they were sufficient in avoidance of the contract. These views find support in *Cowee v. Cornell* (75 N. Y. 91); *Butler v. Prentiss* (158 id. 49); *Kountze v. Kennedy* (147 id. 124); *Hickey v. Morrell* (102 id. 434); *Gray v. Richmond Bicycle Co.* (167 id. 348); *Brooks v. Martin* (2 Wall. 70); *Smith v. Land & House Property Corporation* (28 Ch. Div. 15). The finding of the court answers all of the requirements of a finding which established a fraud. Although we reach the conclusion that a recovery in this case should be sustained, yet we also conclude that the judgment which has been entered herein is much broader than that to which the plaintiff is entitled. His interest is fifteen per cent of all profits derived from the 10,100 shares of the stock of the old company, no matter what form such shares of stock assumed or how the profits were derived from its use. By the judgment which has been entered the defendants are required to account for other shares of stock in which the plaintiff has no interest. If the defendant purchased other shares of stock of the old company which were still outstanding, the plaintiff would have no interest therein, nor would plaintiff have any interest in profits made therefrom. The accounting should, therefore, be limited to the 10,100 shares of the stock of the

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old company and the profits derived therefrom, which is the measure of the plaintiff's right of recovery. Nor do we think that a receivership is necessary at this time to protect plaintiff's rights. The interlocutory judgment provides for an accounting, and when that is taken and the amount is determined to which the plaintiff is entitled, the court can in the final judgment make such provision as is deemed necessary for the full protection of the plaintiff's interest.

The judgment should, therefore, be modified as expressed in this opinion, and as modified affirmed; no costs of this appeal allowed to either party.

O'BRIEN and McLAUGHLIN, JJ., concurred; VAN BRUNT, P. J., concurred in result; INGRAHAM, J., dissented.

INGRAHAM, J. (dissenting):

I do not concur in the affirmance of this judgment. I do not consider it at all necessary to determine the relation that existed between the parties to this action prior to the execution of the agreement of March twenty-seventh, but as I understand it, under the prior agreement, if the stock in the pool was divided, the defendants were to receive 5,100 shares, the plaintiff 250 shares, and the balance of the stock in the pool was to be sold, the defendants to receive from the proceeds of that stock one hundred and six thousand dollars. If the 4,750 shares of stock sold above twenty-two dollars and fifty cents per share, the plaintiff was to receive the difference between twenty-two dollars and fifty cents and twenty-seven dollars in stock at twenty-two dollars and fifty cents per share. If the stock sold for more than twenty-seven dollars a share, the amount realized over twenty-two dollars and fifty cents per share was to be divided between Garrison, Spier and Hyde. As I look at it, there was no partnership or joint adventure by which the defendants became trustees for the plaintiff. The plaintiff never became the owner of any stock. He had an agreement with the defendants by which he was to receive 250 shares of stock in the event that the arrangement was carried out, and a certain further sum in the event that profits were realized, as compensation for the services that he had rendered in relation to the transaction. The complaint alleges that prior to the execution of the agreement of February 24, 1899, Hyde had purchased 10,100 shares of stock of the Goodson Type

Casting and Setting Machine Company, a corporation organized under the laws of the State of Minnesota; that he had paid in cash therefor \$106,000, and that in purchasing that stock plaintiff had rendered certain services to Hyde, the compensation for which was secured to him by the agreement of February 24, 1899, which liquidated the claim for compensation for his work, labor and services in obtaining the contract for this stock. Hyde had become the owner of the stock by purchase, for which he paid \$106,000. He was indebted to the plaintiff for services which the plaintiff had rendered in procuring that stock, and he agreed to pay for such services by delivering to plaintiff 250 shares of the stock and a contingent interest in the event that a portion of the stock was sold at a price which would realize a profit. There was here no joint adventure, no relation of trust, no partnership, but simply an agreement by Hyde to discharge an obligation that he was under to the plaintiff for the services rendered. Under this agreement, there was no intention to organize a new company, or to deal with the stock in any way except to sell it.

By the contract of March twenty-seventh an entirely different disposition of this stock was contemplated, which was inconsistent with the arrangement of February twenty-fourth and which abrogated that agreement. The agreement of March twenty-seventh, instead of a sale of this stock, provided for the organization of a new company, and that the 10,100 shares of stock of the Type Casting and Setting Company then owned by Hyde were to be exchanged for an equal number of shares of stock in the new company. There was thus to be substituted in the possession of Hyde 10,100 shares of stock of the new company in place of stock of the old company that Hyde then owned; and the plaintiff necessarily, by joining in this understanding, relinquished all right that he had in profits that might be realized from the sale of the old company's stock. His right was limited by the agreement that he then made with Hyde. The new agreement provided that Hyde expected to place the 10,100 shares of stock of the new company in a pool, the stock to be charged to the pool at the rate of twenty-two dollars and seventy-five cents per share, and that he expected to have this stock underwritten or sold; that a part of the money to be realized on that sale was to be paid to the company to

be used as working capital, Hyde reserving the right to fix the amount, and the expenses in selling the stock were also to be paid. It was then understood that the profit to accrue in connection with the 10,100 shares of stock of the company was to be the net sum realized upon the sale of the said stock, after deducting and repaying to the persons depositing it the sum of twenty-two dollars and seventy-five cents per share and deducting the expenses and the amount fixed by Hyde as working capital for the new company.

Now it seems to me that this arrangement was entirely clear. Hyde and his associates had purchased the 10,100 shares of stock, paying therefor \$106,000. They were to transfer that stock to the new company, and were to receive from the new company an equal number of shares of its capital stock. These 10,100 shares of the stock of the new company were to be placed in a pool and, when sold, from the proceeds Hyde was to receive an amount equal to \$22.75 per share for the 10,100 shares. There was also to be deducted from the amount realized upon the sale of the stock the expenses and such a sum as should be paid to the company for its working capital, and the balance was to be considered as the profits in which the plaintiff was entitled to share. It was then provided that, as a consideration for the services rendered by the plaintiff, Hyde would be willing to "set aside for your benefit as full compensation for your services 15% of whatever net profits estimated on the above basis may be found to have been realized from the sale of the pooled stock after the entire 10,100 shares have been pooled and sold;" and "it is understood, however, that this 15% interest relates only and applies solely to the 10,100 shares of stock of the new company and to the net profits, if any, to be derived from the sale thereof on the basis as above stated."

By this agreement the plaintiff was limited to the fifteen per cent of the net profits upon the 10,100 shares of stock of the new company to be issued in exchange for old stock owned by Hyde. To this the plaintiff agreed, and it is this agreement that plaintiff asks to enforce. Hyde proceeded to carry out this arrangement, and negotiations were commenced with a firm of bankers for a sale of the stock of the new company when organized. Those negotiations finally resulted in a contract between Hyde and the bankers, Talbot J. Taylor & Co. That agreement recites that Hyde and his

associates had acquired control of the Type Casting and Setting Company (the old company), and intend to organize under the laws of the State of New Jersey the Graphotype Company (the new company) for the purpose of acquiring the entire capital stock of the old company and the ownership of the patents and other patents belonging to it, and the agreement provides that on or before May 23, 1899, Taylor & Co. should, in the event that their examination into the validity of the patents proved satisfactory, purchase from Hyde 10,000 shares of the preferred stock and 10,000 shares of the common stock of the new company; that the new company was to have 25,000 shares of the par value of \$100 each of the preferred stock and 25,000 shares of the par value of \$100 each of the common stock; that the new company was to issue to Hyde 24,999 shares of preferred stock and 25,000 shares of the common stock, for which Hyde was to deliver to the new company the 10,100 shares of stock of the old company and \$374,000 in cash, Hyde to procure, by purchase or exchange, all of the balance of the stock of the old company, amounting to 9,900 shares, and to transfer it to the new company, and for each share of stock of the old company Hyde was to receive of the amount issued to him by the new company one share of preferred stock and one share of common stock; that in the event that Hyde was unable to acquire all of the stock of the old company by the 4th of September, 1899, he should on that date return to the new company the amount of common and preferred stock to which he was not entitled under the contract. It was further provided that on or before the 31st day of May, 1899, Taylor & Co. would pay to Hyde, in the event that their examinations of the machinery and patents owned by the company were satisfactory, the sum of \$187,500 on account of 10,000 shares of preferred and 10,000 shares of common stock of the new company, purchased by them from Hyde, and that the remaining \$562,500 on account of such purchase was to be paid by Taylor & Co. to Hyde in three equal installments, payable July 1, 1899, September 1, 1899, and November 1, 1899, and Hyde was to deposit in a trust company 10,000 shares of the preferred stock and 10,000 shares of common stock, to be held by the company for one year from the date of the agreement, and not to be sold within that time. This agreement was signed on the sixth day of May, and after it was signed Hyde had

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an interview with the plaintiff at his office, when a new agreement was made, which the plaintiff alleges was induced by false and fraudulent representations of Hyde, and which the court below has found was void because of such representations.

It does not seem to be disputed that if the new agreement of May 8, 1899, is binding upon the plaintiff, this action cannot be maintained, and the right of the plaintiff to require an accounting from Hyde under the original agreement of March twenty-seventh depends upon whether or not the agreement of May eighth was properly abrogated. The defendant Hyde, who was corroborated by the defendant Garrison, denied having made the representations claimed by the plaintiff; but the court having found that such representations were made, we must assume that Hyde did make the representations testified to by the plaintiff; and the question first presented is whether those representations were proved to be false so that a contract based upon them was fraudulent as against the plaintiff.

To determine whether or not those representations were false, it is necessary to determine just what interest the plaintiff had at the time of his interview with Hyde which resulted in this agreement of May eighth. By the contract with Taylor & Co., Hyde was to get for the 10,100 shares of stock of the old company and the payment to the new company of \$374,000 in cash, 10,100 shares of preferred stock and 10,100 shares of common stock in the new company. This sum of money, I assume, would be the working capital which, under the letter of March twenty-seventh, was to be paid to the new company and deducted from the proceeds of the sale of the stock of the new company which was to be issued to Hyde in lieu of the 10,100 shares of stock of the old company. The agreement with Taylor & Co. was not absolute, but depended entirely upon an examination of the patents and machinery proving satisfactory to Taylor & Co. Hyde was entitled to receive for the stock of the old company \$22.75 per share, amounting to \$229,725. He was required to pay in cash to the new company \$374,000. Taylor & Co. had agreed to pay for 20,000 shares of stock (10,000 of preferred, 10,000 of common), if things were satisfactory, \$750,000 on or before November 1, 1899. Hyde had agreed to purchase the remaining stock in the old company, for which he was to receive stock in the new company at the rate of one share of preferred and

one of common for each share of stock of the old company; and the stock that Hyde was to receive was to be deposited so that it could not be sold or used for one year.

It is clear that under this agreement there could be no profits ascertained until the expiration of the year from the date of the Taylor agreement. Whether there would be any profit at all depended, *first*, upon whether or not Taylor & Co. would carry out their contract which was contingent upon the patents and machinery being satisfactory to them, and then upon the price at which the stock that Hyde retained could be sold after the expiration of the year, so that at the time of the conversation between Hyde and the plaintiff there were no profits upon the undertaking to which the plaintiff was entitled. The new company was not then organized, as the date of its organization was May 31, 1899. The plaintiff testified that at that time he knew that Hyde was negotiating with Taylor & Co. for the sale of some of the stock of the new company, such negotiations having been discussed between the plaintiff and Hyde in a general way, and the plaintiff knew that representatives of Taylor & Co. were frequently at the office of the company, and the plaintiff familiarized himself, so far as he could, with what was going on between them and Hyde. The plaintiff also knew that Hyde had employed Mr. E. N. Dickerson, a patent attorney, and had made an agreement with him by which, for services rendered, Dickerson was to have twenty per cent of the net profits of the transaction and knew that the new company had not been formed. The plaintiff, with this knowledge, after the agreement with Taylor & Co. had been executed, saw Hyde, and the plaintiff testified that Hyde said to him, "Now, Spier, I want you to accept ten per cent instead of fifteen." This the plaintiff objected to, when some discussion followed, and Hyde then said, "Well, the profits of the pool are only about 2,475 shares and your percentage of that would be about 361 and a fraction," and then Hyde offered the plaintiff 375 shares, which the plaintiff accepted on Hyde's representation that the profits of the pool were only about 2,475 shares. Spier also testified that Hyde said that Taylor & Co. had made other exactions in regard to the shares of stock that they were to purchase, and that this was the basis for the statement that the pool profits would be 2,475 shares of the stock.

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Assuming that such a statement was made, it must be apparent that the plaintiff understood that this statement of profits was a mere estimate based upon what was the expected result of the negotiations with Taylor. The plaintiff knew that no new corporation had been organized. He also knew that under his agreement he was entitled, not to any amount of stock, but to the net profits to be realized by a sale of the stock of the new company received for the 10,100 shares of the stock of the old company after all expenses had been paid and a working capital had been provided for the new company. The defendant testified that the plaintiff had knowledge of the terms of the contract with Taylor. That the plaintiff denied, but he knew perfectly well that, under his contract, there could be at that time no statement of the profits to a percentage of which he was entitled. He also knew that under no condition would he be entitled to any number of shares of the stock of the new company, but only to fifteen per cent of the net profits after all of the stock issued to Hyde in lieu of his 10,100 shares of stock of the old company had been sold. Assuming that the contract with Taylor & Co. was carried out, was it at all certain that there would be any profits upon the final completion of the contract? That would necessarily depend upon the amount that it would cost Hyde to procure the additional stock of the old company and the amount for which he would be able to sell the stock of the new company after the year had expired, during which time it was to be deposited with the trust company. With the knowledge that the plaintiff had of the transaction, it is clear that the plaintiff did not understand, and could not have understood, that Hyde represented at that time that there was any profit in the transaction to which the plaintiff was then entitled, or that Hyde's statement was anything more than a proposition to accept a certain amount of preferred and common stock of the new company in lieu of the fifteen per cent of the cash profits of the transaction after all the stock that was issued to Hyde in lieu of the 10,100 shares of stock of the old company had been sold. And that the plaintiff relied upon Hyde's representations that the profit of the pool stock was at that time 2,475 shares, of which he was entitled to receive fifteen per cent, when the plaintiff knew that no company had been organized and was told that Taylor & Co. were negotiat-

ing for a purchase of an interest in the company and had made additional demands for stock, is directly contradicted by the conceded facts. There could be under the agreement no profits to the plaintiff at all until the stock of the new company had been issued and sold, the amount furnished as working capital determined and the expenses paid; and plaintiff knew all this as well as Hyde knew it. The plaintiff says that relying upon this representation he made a contract by which he agreed to accept 375 shares of preferred and 375 of common stock of the new company in the event of the formation of that company, which stock should be in full for his services and all demands under the agreement of March 27, 1899, and the agreement then contained this clause: "This, of course, depends upon the formation of the Goodson Graphotype Company and the carrying out of our plans of reorganization as mentioned to you to-day." This letter expressly states that the stock to be given to the plaintiff was to be the stock in a company to be organized, and the form of the understanding which he accepted in writing as perfectly satisfactory to him and which by such acceptance he adopted, is a clear statement that the agreement to accept this stock was based upon a plan of reorganization to be carried out in the future which had been discussed between Hyde and the plaintiff, and any statement of the profits of such an arrangement to be carried out in the future would clearly be a statement of estimated or contemplated profits and not a statement of profits that had been realized or fixed which could be the basis of a charge of false or fraudulent misrepresentations.

It is clear to me that, accepting this whole conversation as testified to by the plaintiff as true, there is no representation made as to the existence of profits, but a mere statement of what it was contemplated would be the profits if the agreement with Taylor & Co. was carried out, and that the plaintiff could have understood nothing else from the statement that was made by Hyde. But if it be assumed that Hyde did state that the profits of the pool at that time were only about 2,475 shares there is no evidence that this statement was false. It is clear that it was here intended that the profits would be 2,475 shares of the preferred and 2,475 of the common stock, of which plaintiff would be entitled to 750 shares of each. What Hyde was to receive from the transaction of the 10,100 shares of stock of the old company and what, as I understand, he did

receive was 10,100 shares of preferred stock and 10,100 shares of common stock. But it was not agreed that the plaintiff should receive fifteen per cent of the stock that Hyde was to receive for the 10,100 shares of the old stock that he transferred to the company. There is certainly nothing in this evidence to show that, after deducting the amount of stock necessary to procure the sums of money required to pay the twenty-two dollars and seventy-five cents per share, the expenses and the working capital, there would be any more stock to divide among those who were entitled to the proceeds of the profits realized, than that stated by Hyde, if stock instead of cash was to be distributed. There is nothing, therefore, to show or that tends to show that at the time this statement was made it was a false statement of the profits to an interest in which the plaintiff was entitled. Assuming that the plaintiff's story is true, I think the statement made by Hyde was necessarily made as an estimate of what the profits would be in the future if the transaction was carried out; that it was so understood by the plaintiff; that there is no evidence that at that time that statement was false, and that the finding of the court that the agreement of May 8, 1899, was induced by fraud was unsupported by the evidence, and for that reason the judgment should be reversed.

Judgment modified as directed in opinion, and as modified affirmed, without costs of appeal.

THE JENNIE CLARKSON HOME FOR CHILDREN, Respondent, v. CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant, Respondent, and ROBERT GIBSON, as General Partner of the Limited Partnership of H. KNICKERBOCKER & Co., Appellant.

Railroad bonds registered in the name of a charitable corporation—the registration changed to bearer under an unauthorized transfer by its treasurer and a forged resolution—liability to the charitable corporation of the railroad company and of a brokerage house which witnessed the transfer—liability of the brokerage house to the railroad company—an objection that the issues in an action are triable at law and not in equity cannot be first taken on appeal.

A railroad company issued coupon mortgage bonds payable to bearer. The bonds and the mortgage given to secure their payment authorized the owner to register the bonds in his name, and provided that, if so registered, they would thereafter be transferable only upon the books of the company by the owner

in person or by his attorney duly authorized. Provision was also made for a change in the registration of the bonds so that they should again become payable to bearer.

A charitable corporation purchased three of the bonds and procured them to be registered in its name. Thereafter, the treasurer of the charitable corporation who was the custodian of the bonds, but who had no authority, actual implied or apparent, to sell the bonds, without the knowledge of the charitable corporation, abstracted the bonds from the place in which they were kept, went to the office of a brokerage firm and told the cashier thereof that the charitable corporation desired to sell the bonds. The cashier told the treasurer that the bonds could not be sold unless they were registered as payable to bearer and instructed the treasurer to take the bonds to the transfer agent of the railroad company and ascertain how the change in registration could be effected.

Thereupon the treasurer called upon the transfer agent of the railroad company and was informed that it was necessary to furnish to the railroad company a power of attorney executed by the charitable corporation with the signature thereof guaranteed by a firm represented on the New York Stock Exchange and also a copy of the resolution of the board of directors of the charitable corporation authorizing the transfer.

On communicating these facts to the cashier of the brokerage firm, the latter filled out a power of attorney authorizing the transfer of the bonds to bearer. The treasurer of the charitable corporation signed the power of attorney on behalf of the charitable corporation in his capacity as treasurer and it was witnessed by the cashier of the brokerage firm. One of the members of the brokerage firm also signed the power of attorney with the firm name. The treasurer then produced a forged resolution of the board of directors of the charitable corporation authorizing the transfer of the bonds.

The power of attorney and the forged resolution were taken to the transfer agent of the railroad company who thereupon registered the bonds as payable to bearer. The bonds were then delivered to one of the members of the brokerage firm who sold the same and received the proceeds thereof. He turned the proceeds of such sale over to the treasurer of the charitable corporation and the latter appropriated them to his own use.

Held, that, when the bonds were registered in the name of the charitable corporation, the negotiability thereof was destroyed, and that, until the charitable corporation, or its duly authorized agent, transferred them or procured them to be registered as payable to bearer, the bonds occupied the same status as any other non-negotiable obligation of the railroad company;

That the acts by which the change in the registration of the bonds had been effected, having been done without the authority of the charitable corporation, there had been, as between the charitable corporation and the railroad company, no change in the ownership of the bonds, and that the charitable corporation was entitled to recover from the railroad company the bonds themselves or their value;

That the railroad company, in case it furnished such bonds or paid the value thereof, was entitled to recover their value from the brokerage firm.

That the charitable corporation was also entitled to recover the value of the bonds from the brokerage firm.

VAN BRUNT, P. J., and INGRAHAM, J., dissented from the latter proposition.

Where two defendants sued by the former owner of certain bonds issued by one of such defendants, a railroad company, and sold by the other defendant, a stockbroker, each answer the complaint and the railroad company also asks affirmative relief against the stockbroker and the case is tried upon the issues so formed as an equity case before the court without objection by either defendant, it is too late upon appeal for either defendant to insist that the question of the liability of the defendants to the plaintiff or of the stockbroker to the railroad company presented a legal liability which could only be enforced in an action at law.

APPEAL by the defendant, Robert Gibson, as general partner of the limited partnership of H. Knickerbacker & Co., from a judgment of the Supreme Court in favor of the plaintiff and against both defendants, and as between the defendants in favor of the defendant the Chesapeake and Ohio Railway Company, entered in the office of the clerk of the county of New York on the 22d day of July, 1903, upon the decision of the court rendered after a trial at the New York Special Term.

Also an appeal by the defendant, the Chesapeake and Ohio Railway Company, from that portion of the said judgment providing for the plaintiff's recovery against said railway company.

Austen G. Fox, for the appellant Gibson.

John S. Sheppard, Jr., for the appellant, respondent railway company.

Henry W. Sackett, for the plaintiff, respondent.

INGRAHAM, J.:

The action was brought in equity, the relief asked being that the defendants be required to deliver to the plaintiff bonds and coupons of like kind and value as those described in the complaint, or that the defendants be required to account to plaintiff for the value of said bonds and coupons, and for other and further relief. The defendant the Chesapeake and Ohio Railway Company answered, denying liability, demanding that the complaint be dismissed and asking that the ultimate rights of the defendant railway company and the defendant Gibson as between themselves be determined

and that the Chesapeake and Ohio Railway Company have such affirmative relief against said Gibson as it may be entitled to receive, and that it may have such other or further or different relief in the premises as such defendant may be entitled to. This answer was served upon the defendant Gibson. Gibson answered and demanded judgment that the complaint be dismissed. On these pleadings the action was brought on for trial at Special Term.

No objection to the form of the action was at any time taken by either of these defendants, nor did either of them insist that the action was not properly triable as one in equity or that either party was entitled to a trial by a jury. The questions presented by the pleadings so far as the record shows were submitted to the trial court and a determination as to the ultimate liability of the defendants to the plaintiff and of the defendant Gibson to the railway company was asked for. At the end of the plaintiff's case and again at the end of the whole case, the defendants severally moved to dismiss the complaint upon the ground that neither of the defendants was liable to the plaintiff; and the defendant Gibson also moved to dismiss the cause of action set out in the answer of the railway company upon the ground that he was not liable to it. The railway company asked for judgment against Gibson. These motions were taken under consideration by the court, the parties submitting the questions as to their liability without objecting to the form of action. Upon appeal it is too late for either of the parties to the action to insist that the question of the liability of the defendants to the plaintiff, or of the defendant Gibson to the Chesapeake and Ohio Railway Company, was a legal liability which could only be enforced in an action at law. By this submission, the court was justified in determining the question between the parties to the action, irrespective of the form in which it was brought; and the extent of the liability of the defendants will be the only question considered on this appeal.

After the submission of the case, the court found the facts as to which there was no substantial dispute and the questions resolve themselves into questions of law upon the facts thus found. It was found that the plaintiff was a domestic corporation organized for charitable purposes, and the defendant the Chesapeake and Ohio Railway Company was a foreign corporation having a registry or trans-

fer office in the city of New York; that its transfer agents were J. P. Morgan & Co., a member of whose firm was a member of the New York Stock Exchange; that the defendant Gibson was the general partner of the limited copartnership of Knickerbaeker & Co., stock-brokers doing business in the city of New York, the defendant Gibson being a member of the New York Stock Exchange. In April, 1898, the plaintiff purchased and caused to be registered in its name on the books of the defendant the Chesapeake and Ohio Railway Company three bonds issued by the railway company, of the par value of \$1,000 each, due in 1902 to secure the payment of which a mortgage was executed by the defendant railway company. These bonds when registered could only be transferred on the books of the company by the registered holder thereof or by his attorney duly authorized. At the time of the purchase, Charles J. Townsend was treasurer of the plaintiff corporation, and he reported the purchase and registration of these bonds to the directors of the plaintiff, and their purchase and registration in the name of the plaintiff corporation was approved; these registered bonds were kept in a safe hired by the plaintiff corporation in the vaults of a bank in the city of New York. To this box both the president and treasurer of the corporation had access. On March 12, 1900, one Lessells was elected treasurer of the plaintiff corporation and continued in that office until March 21, 1902. On March 12, 1902, Lessells went to the office of the defendant Gibson with these three bonds of the Chesapeake and Ohio Railway Company, registered in the name of the plaintiff corporation, and told John F. Busch, the cashier of the defendant Gibson, that the plaintiff desired to sell these bonds. Busch told Lessells that before the bonds could be sold they must be registered as payable to bearer, and instructed Lessells to take the bonds to the transfer agent of the defendant corporation and ascertain how the change to bearer could be effected, whereupon Lessells called upon the transfer agent of the defendant corporation and was informed by such transfer agent that it was necessary to furnish to the defendant corporation a power of attorney executed by the plaintiff corporation and the signature thereon guaranteed by a firm, one of whose members was a member of the New York Stock Exchange, and also a copy of the resolution of the board of directors of the plaintiff corporation authorizing the transfer. Lessells

returned to Gibson's office and told Busch that the transfer agents required a copy of the minutes of the directors authorizing the transfer and a power of attorney. Busch, therefore, filled out a power of attorney, authorizing the transfer of the bonds of the Chesapeake and Ohio Railway Company to bearer, which was signed by Lessells, "The Jennie Clarkson Home for Children, George W. Lessells, Treas.," and witnessed by Busch, and Gibson signed the power of attorney with the firm name of Knickerbacker & Co. Lessells also produced what purported to be a resolution of the board of directors of the plaintiff corporation authorizing the transfer of the bonds, to which there was forged the name of the secretary of the plaintiff corporation, and to which there was affixed a forged seal of the plaintiff corporation. No such resolution was ever adopted by the plaintiff corporation, nor did the defendant corporation or any of its officers or members, except Lessells, have any knowledge of the transaction. Lessells procured the bonds from the safe deposit box of the plaintiff corporation without the knowledge of its officers or directors, and had no authority whatever, either under its by-laws or from its directors or officers to dispose of them in any way. This power of attorney transferring the bonds and the forged copy of the spurious resolution were taken to the transfer agent of the railway company, and thereupon the bonds were transferred to bearer; and the bonds so transferred were delivered to the defendant Gibson, who sold the same and received the proceeds thereof. Gibson thereupon drew a check to the order of George W. Lessells, treasurer, who indorsed it, whereupon Knickerbacker & Co. cashed the check and paid the amount in cash to Lessells and took his receipt therefor. Lessells appropriated the money to his own use, and the plaintiff never received the proceeds of the sale of the bonds. Immediately upon the discovery of Lessells' acts the plaintiff made a claim against the railway company and against Knickerbacker & Co. for the value of the bonds, and liability therefor having been denied, this action was brought.

The court having found these facts, directed judgment that "the defendants, Chesapeake and Ohio Railway Company and Robert Gibson, as general partner of the limited partnership of H. Knickerbacker & Co., replace and pay over to the plaintiff three certain bonds issued by the defendant Chesapeake and Ohio Railway Com-

pany * * * or bonds of like kind and value; or in default thereof, that the said defendants pay to the said plaintiff the sum of three thousand two hundred and sixty-two and 50 / 100 dollars (\$3,262.50), the value of said bonds and of said coupons that matured between March 12, 1902, and June 5, 1903, together with interest thereon from the 5th day of June, 1903;" and it was further "ordered, adjudged and decreed, that in case the defendant Chesapeake and Ohio Railway Company shall be required to pay the within judgment or any part thereof, the defendant Robert Gibson, as general partner as aforesaid, shall repay to the said defendant Chesapeake and Ohio Railway Company the amount so paid by it on said judgment as aforesaid," and in pursuance of this direction judgment was entered.

There are three questions presented on this appeal: *First*, as to the liability of the Chesapeake and Ohio Railway Company to the plaintiff; *second*, as to the liability of the defendant Gibson to the plaintiff, and *third*, as to the liability of the defendant Gibson to the railway company for the amount that it should be required to pay to the plaintiff. We will first discuss the right of the plaintiff to recover from the Chesapeake and Ohio Railway Company the value of the bonds.

When these bonds were issued they were what are ordinarily known as coupon bonds, payable to bearer, and in this form they were negotiable and passed by delivery to a holder for value without notice of any defect in the title of the transferrer. In the bonds and the mortgage to secure their payment there was a provision which authorized the holder of the bonds to register them in his name so that their negotiability was destroyed. Each bond contains this provision: "This bond may be registered on the books of the Railway Company, at its office or agency in the city of New York, and if so registered it will thereafter be transferable only upon the books of the Company by the owner in person, or by attorney, duly authorized, unless the last preceding transfer shall have been to bearer, and transferability by delivery thereby restored." And the mortgage to secure these bonds contained the following provision: "And it is further mutually agreed that the said Chesapeake and Ohio Railway Company shall and will keep a register or

registers of bonds issued hereunder at its office or agency in the city of New York * * * and that any holder or holders of any of the coupon bonds issued under the provisions hereof may register his or their bond or bonds upon presenting the same, and that when a bond shall be so registered the person or persons in whose name or names the same shall be registered shall be deemed and regarded as the owner or owners thereof for all purposes, and payment of or on account of the principal sum in such registered bond mentioned shall thereafter be made to such person or persons, his or their order only, and all such payments so made shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid, provided that such registry may be changed, and the bond so registered be transferred, upon presentation, with the written order of the person or persons in whose name or names the same shall stand registered, properly authenticated, to the person or persons whose name or names shall in such written order be contained to that end; and thereafter the person or persons to whom such bond shall have been so transferred as aforesaid shall be held to be the owner or owners thereof with all the incidental rights and powers, and such transfers may be made from time to time as the registered owner or owners of any such bond for the time being may direct as aforesaid; and the registered owner or owners shall also have the right to register any of the bonds registered in his or their names as payable to bearer, in which case the transferability by delivery shall be restored and the principal thereof be payable to the person presenting the same."

Thus when these bonds were registered as the property of the plaintiff, they became payable to the plaintiff only, and could be transferred only upon the books of the company by the plaintiff or its authorized agent. The railway company became thus an obligor indebted to the plaintiff in the amount represented by these bonds, upon which indebtedness it agreed to pay interest as therein provided and the principal upon maturity. Until the plaintiff assigned or transferred the bonds, that relation between it and the Chesapeake and Ohio Railway Company continued. The provision authorizing the bonds to be retransferred to bearer had no effect upon this obligation of the defendant until such transfer was actually made by the plaintiff or its authorized agent. The discussion

by the railway company as to the effect of this provision for registration and for the transfer of title by the registered owner of the bonds seems to me to leave out of view the formal legal relations that exist between the owner of the bonds in whose name they have been registered and the corporation. There was nothing unusual in that relation; the railway company simply owed the registered owner of the bonds a sum of money which it had agreed to pay as in the bond provided, which was not negotiable. The transfer of this obligation was restricted by the provision in the obligation itself and the mortgage executed to secure it. The responsibility upon such an obligation is not at all different from that upon a bond secured by a mortgage, or other non-negotiable obligation, and it was evidently the intention to assimilate the right of transfer and retransfer of the bonds when registered to the transfer of shares of stock in an incorporated company, and the effect, I think, of this arrangement was to place registered bonds and shares of stock of a corporation upon a similar footing as to the requisites necessary for a transfer, so that the owner of the bonds when registered should be protected from loss, theft or embezzlement.

If this is a correct view of the relation that existed, the solution of the right of the plaintiff to a judgment against the railroad company is clear. The plaintiff has never authorized the transfer of these bonds. Its treasurer had no express power to transfer them. By article 7 of the by-laws of the corporation, the duties and powers of the treasurer are defined. It was directed that he should "have charge of and be responsible for all deeds, contracts and securities, and all moneys belonging to the corporation, from whatever source derived," and by article 8 it is provided that "the finance committee shall aid the treasurer in managing the funds of the corporation. No bill shall be paid without their approval, unless otherwise ordered by the board." Charge of the securities of the corporation is given to the treasurer, and he is responsible for them; but they are given in his charge to be preserved, not to be sold or disposed of. The obligation to keep is distinct from a right to sell, and imposing upon a trustee or agent charge of and responsibility for securities implies the duty to protect and care for them, inconsistent with a right to sell and dispose of them. The treasurer of such an institution has none of the powers of the active manager of a cor-

poration whose business it is to purchase and sell securities or to transact a general banking business, as in the case of the president or cashier of a bank. Such a corporation is not engaged in business requiring the active interference of its officers, and the cases which refer to the implied power of an executive officer of a bank or trading corporation have no relation to the officers of such a corporation as the plaintiff. There is nothing in this by-law that could possibly be construed as giving to the treasurer or any of its officers a power to sell or dispose of its securities. There was no evidence that the plaintiff had given any implied authority to sell or dispose of its securities to Lessells. It was not proved that the treasurer had ever sold any of the plaintiff's securities without authority from the corporation and that such an act had been ratified by the corporation or its directors. None of the facts which justify a finding that the corporation had vested its treasurer with any apparent authority over these securities were proved, nor did the railroad company rely upon any apparent authority that had been conferred upon the treasurer by virtue of his position, for the railroad company required of the treasurer that he produce a resolution of the board of directors authorizing a transfer of the bonds. This was a recognition by the railroad company or its transfer agents of the necessity of an act of the corporation to authorize the transfer of the securities. That the railroad company accepted a forged copy of a resolution does not affect this question. The transfer agent correctly assumed that the treasurer as such had no power to make the transfer, and required proof that such transfer was authorized by the corporation. The proof that it accepted was spurious and not sufficient for the purpose, but, in the face of this requirement, it certainly cannot be said that the corporation relied in any way upon the authority of the treasurer to make a transfer without corporate action. The plaintiff, therefore, never authorized the transfer of these bonds, and the power of attorney authorizing the transfer was never executed by the plaintiff corporation. It purported to be signed with the name of the corporation by Lessells as treasurer, but the signature was unauthorized. The railroad company or its transfer agent, however, having no knowledge of the treasurer or his authority, required, in addition to the presentation to it of the corporate act authorizing the transfer, that

the power of attorney should be guaranteed by a banking house, a member of which was a member of the New York Stock Exchange, and upon that power of attorney being thus guaranteed, they made the transfer.

As between the railroad company and the plaintiff all of this was without authority from the plaintiff, and the railroad company, acting upon these instruments to which the name of the plaintiff had been forged and which was not binding upon the plaintiff, the result was that there never was as between the plaintiff and the railroad company any change of ownership or title to the obligation of the railroad company. The plaintiff is still the owner of the obligations and still entitled to enforce them against the railway company; that the railroad company has placed itself in a position that it is required to recognize others as the owner of bonds that it had issued is no concern of the plaintiff, and the plaintiff is entitled to recover from the railway company either the bonds or their value. It is hardly necessary to cite authorities to sustain this proposition, as it seems to me that it only requires a statement of the relation that exists between the plaintiff and the railway company to determine the legal obligations of the railway company to the plaintiff. The railway company was indebted to the plaintiff for the sum of money represented by the bonds; the plaintiff has never transferred that indebtedness, and the railroad company is still indebted to the plaintiff for the amount due on the bonds and interest.

The only case in this State to which our attention has been called which discussed the legal effect of the registration of coupon bonds is *Cooper v. Illinois Central R. R. Co.* (38 App. Div. 22), where the judgment was affirmed by this court upon the opinion of Mr. Hamilton Odell as referee. The action was brought on twelve bonds of the Illinois Central Railroad Company, which contained substantially the same provisions as those contained in the bonds in question. The bonds had been registered by the executor of the estate of Mary T. Wood. There were two trustees of the estate, who held these bonds and other property in trust. One of the trustees obtained possession of the bonds without the knowledge of his cotrustee, presented them to the railroad company and caused them to be transferred to bearer, sold them and misappropriated the proceeds; and it was held that the railroad company was liable to the

owners of the bonds. This decision which we approved on appeal sustains that view before expressed as to the relation that existed between the holders of the registered bonds and the corporation that has issued them, and so far as it goes is an authority for the plaintiff. The railroad company had knowledge of the fact that these bonds were owned by and registered in the name of the plaintiff, and a person representing himself as treasurer of the plaintiff sought to have the bonds transferred; the railroad company accepted the proof submitted as to his actual authority to make the transfer, and upon the well-recognized rules of agency the right to make the transfer must stand or fall upon the sufficiency of his authority to make such transfer. If it turned out that the agent has no actual authority and there was no act of the owner that estopped it from disputing his authority, it would seem to follow that the railroad corporation was responsible for the unauthorized transfer.

It is contended by the railroad company that the removal of the registry was not the proximate cause of the plaintiff's loss. But this, I think, begs the question. The plaintiff was the legal owner of these bonds, and the railroad company was indebted to it for the amount of the bonds. The plaintiff has never assigned or transferred these bonds or the obligations of the railroad company to it, and that relation still exists. The railroad company in transferring the bonds upon its books to the bearer, who was the person who presented them for transfer, without the authority of the plaintiff, has in effect placed itself in such a position that it is liable to the holder of the bonds to whom they have been transferred. But the plaintiff has not authorized that transfer, and as to the plaintiff it was an illegal and unauthorized act, and the plaintiff has the right to insist upon the railway company's performing its obligations; and upon its inability to perform its obligation, in consequence of its own act in having transferred the bonds to third parties, then the plaintiff is entitled to recover the value of the bonds.

The next question presented is the right of the plaintiff against Gibson as general partner of the firm of Knickerbacker & Co. In this action the plaintiff has based its right to recover upon the fact that Lessells had no authority to transfer these bonds or to sell them and no authority to receive the proceeds thereof when sold. He, therefore, never acted as the authorized agent of the plaintiff in his deal-

ing with either the railroad company or Gibson. To impose such a liability there must be either a contract relation between plaintiff and Gibson or Gibson must be in such a position that he owes a duty to the plaintiff which he has violated. If the plaintiff had ratified Lessells' act in assuming authority to sell the bonds Gibson would then be the plaintiff's agent and responsible to it as such. The plaintiff, however, bases its right to recover against the railroad company upon the fact that Lessells had no authority to sell the bonds or to transfer them upon the books of the railroad company and that the railroad company is liable because it acted upon the authority that Lessells assumed when he represented that he had authority to act for the plaintiff in transferring the bonds. This latter position is inconsistent with a claim that Gibson is liable to the plaintiff for his subsequent act in selling the bonds. There was no relation between Gibson and the plaintiff. He had no authority from the plaintiff to act as a broker or to sell the bonds to third parties and was under no obligation to the plaintiff to protect it. He received certain bonds issued by the railroad company to bearer and sold them, received the proceeds and paid them to Lessells. The transfer of the plaintiff's bonds was void as between it and the railroad company and plaintiff was never divested of its title to them. It was not plaintiff's bonds that Gibson sold as plaintiff still owned the obligations of the railroad company. The railroad company issued bonds payable to bearer to Lessells. These Gibson sold for account of Lessells and accounted to him for the proceeds, but with this transaction I do not see that the plaintiff has anything to do.

The fact that Gibson guaranteed the genuineness of the plaintiff's signature to the railroad company has an important bearing upon Gibson's responsibility to the company for any damage that it sustained by reason of a lack of authority of Lessells to sign the power of attorney on behalf of the plaintiff; but that act can have no bearing upon the liability of Gibson to the plaintiff, as that guaranty was one to the railroad company, not to the plaintiff. Gibson guaranteed the genuineness of the plaintiff's signature to the power of attorney and in consequence of that guaranty the railroad company acted in relation to the bonds registered in plaintiff's name so as to render it liable to the plaintiff, but as Gibson was under no duty or obligation to the plaintiff that act it seems to me can impose no

obligation upon Gibson in favor of the plaintiff. The complaint does not allege, nor does the court find any facts to justify the judgment against Gibson in favor of the plaintiff, either upon the ground of negligence or conversion or in replevin, and the failure to allege either a contractual relation between the plaintiff and Gibson or any neglect of Gibson to perform any duty that he was under to the plaintiff, or that Gibson has received, converted or detains the plaintiff's property seem to me to preclude the plaintiff from recovering against Gibson.

The third question presented is as to the right of the railroad company to recover the amount that it is compelled to pay to satisfy the claim of the plaintiff against it. The fact that the railroad company or its transfer agent refused to transfer these bonds unless the genuineness of the plaintiff's signature to the power of attorney was guaranteed by a member of the New York Stock Exchange, and that in compliance with this condition imposed by the transfer agent of the railroad company and in accordance with the rules of the New York Stock Exchange, Knickerbacker & Co. signed the power of attorney to transfer the bonds, is not disputed; and these facts are found by the court. The defendant does not claim that the signature of his firm was placed upon this power of attorney for any other reason than to comply with the conditions imposed by the transfer agent of the railroad company and the rule of the Stock Exchange. Lessells' signature to the power of attorney was witnessed by Busch, the cashier of Knickerbacker & Co.; but the signature of Knickerbacker & Co. to the power of attorney was not placed upon that instrument merely as a witness to Lessells' signature. It is not disputed but that Gibson understood that the signature of his firm was necessary before the bonds would be transferred. Busch testified that he knew that Knickerbacker & Co.'s signature to the power of attorney would have to be there before the bonds would be transferred, and that the signature of a firm who had a member in the Stock Exchange was required before a transfer would be made. Gibson testified that he signed the name of his firm to the power of attorney, but when asked whether he understood that it was the custom of the street that the signature of his house upon the power of attorney guaranteed its validity, his counsel objected and that objection was sustained. It is in evidence

that Busch procured the signature of Knickerbacker & Co. upon this power of attorney from Gibson and did it for the purpose testified to by him, and relying upon that signature the railroad company transferred the bonds to bearer, having refused to make such transfer without such a guaranty. The rule of the Stock Exchange is: "An indorsement by a member of the Exchange or a firm represented at the Exchange on a certificate is considered a guarantee of the correctness of the signature of the party in whose name the stock stands." The transfer agents and Knickerbacker & Co. were members of the exchange and the transfer agents refused to transfer the bonds without the signature of a Stock Exchange house. This was, I think, an express guaranty of the genuineness of the plaintiff's signature to the power of attorney by Knickerbacker & Co., not the genuineness of Lessells' signature, but the signature of the plaintiff, the owner of the bonds; as it was placed upon this power of attorney for the purpose of guaranteeing to the transfer agent of the railroad company the genuineness of the plaintiff's signature, which involved a guaranty of the authority of Lessells to sign the power of attorney on behalf of the plaintiff, and as the railroad company, acting upon that guaranty, Gibson was liable to the railroad company for any damages that it sustained in consequence of the signature of the plaintiff to the power of attorney being unauthorized. (*Boston & Albany Railroad v. Richardson*, 135 Mass. 473.) The case of *Starkey v. Bank of England* (App. Cas. [1903] 114) is directly in point. It would seem to follow, therefore, that Gibson was responsible to the railroad company for any loss that it sustained in consequence of a lack of authority of Lessells to transfer the bonds, and that the railroad company is entitled to judgment against Gibson for the amount that it is required to pay to the plaintiff.

I think, therefore, the judgment appealed from should be modified by requiring the Chesapeake and Ohio Railway Company to restore to the plaintiff the three bonds which it had illegally transferred, or in default of the delivery of such bonds to the plaintiff, the plaintiff should have judgment for the value of the bonds as found by the court, with interest, and that the Chesapeake and Ohio Railway Company is entitled to judgment against the defendant Gibson for the amount that it is required to pay to the plaintiff as

the value of the bonds, with interest thereon, and as modified the judgment should be affirmed, with costs to the plaintiff.

VAN BRUNT, P. J., concurred in result.

HATCH, J. (concurring):

I concur in the opinion of Mr. Justice INGRAHAM so far as it disposes of the questions arising between the railway company and the plaintiff, and also between the railway company and Gibson. I also think that the plaintiff is entitled to the judgment which it had obtained against Gibson. The form which the trial of the action assumed conferred authority upon the court to award any relief which the facts warranted, and as it appeared that the defendant Gibson could be made liable for a conversion of the proceeds of the bonds, it was proper for the court to award the judgment against him which it did. I am, therefore, for the affirmance of the judgment in its entirety.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J. and INGRAHAM, J., dissented as to defendant Gibson.

PATTERSON and LAUGHLIN, JJ. (concurring):

We concur in the opinion of Mr. Justice INGRAHAM, except so far as the liability of the defendant Gibson to the plaintiff is concerned, and with respect to that we concur in the opinion of Mr. Justice HATCH.

Judgment affirmed, with costs.

MARY E. MAHON, as Administratrix de Bonis Non of ANNIE POMORE, Deceased, Respondent, v. DIME SAVINGS BANK OF BROOKLYN, Appellant.

The delivery of savings bank books accompanied by the statement "If I die, bury me out of this and what is left is yours" — the transaction constitutes a gift causa mortis — proof that a particular bank book was among those delivered.

Evidence that a woman, shortly before her death, while very sick, delivered a number of pass books representing deposits made by her in savings banks to a third person, at the same time saying to such person, "I think I am dying
* * * I give you this. If I die, bury me out of this and what is left is

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years," is sufficient to establish a valid gift *causa mortis* of the savings bank deposits to such third person.

Evidence sufficient to identify a particular pass book as being among those delivered, considered.

VAN BRUNT, P. J., dissented.

APPEAL by the defendant, the Dime Savings Bank of Brooklyn, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York upon the verdict of a jury, and also from an order entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

C. N. Bovee, for the appellant.

Edward Hymes, for the respondent.

McLAUGHLIN, J.:

This action was brought to recover a balance due to the plaintiff's intestate, Annie Podmore, which, at the time of her death, she had on deposit with the defendant under the name of Annie Colwell. The action was originally brought by John Podmore as administrator, but subsequent to its commencement he died and the plaintiff was substituted as administratrix *de bonis non*. The answer, among other defenses, alleged a gift *causa mortis* by Annie Podmore to one Bridget Reilly and payment by the bank to her of the amount for which a recovery was sought.

At the trial the facts were undisputed that, after the death of Mrs Podmore, Mrs. Reilly presented the passbook which the defendant had issued to Mrs. Podmore and demanded payment of the money represented thereby, and that after some negotiations such sum was paid to her, but it was insisted on the part of the plaintiff that there was no legal justification for this payment. Bearing upon this claim, at the conclusion of the trial, two questions were submitted to the jury: (1) Whether there was a gift of the passbook and money represented thereby to Mrs. Reilly; and (2) whether the evidence established the identity of the book in question as one of those given. The jury found for the plaintiff and defendant has appealed.

Upon the subject of the gift the defendant read, under a stipu-

lation, the testimony given by a Mrs. Catherine Hurst in an action in which the amount represented by another passbook was involved. She there testified in substance that she was acquainted with Mrs. Reilly and had been with Mrs. Colwell in her lifetime ; that on the 22d of November, 1897, she was at Mrs. Reilly's house and there saw Mrs. Colwell, who was then very sick ; that Mrs. Reilly, assisted by herself and a Mrs. Madden, changed Mrs. Colwell's clothes, and as they did so they found secreted about her waist a bag in which there were a number of bank books ; that Mrs. Reilly then said to Mrs. Colwell : " Now you are very sick, and she replied, ' yes, I am going to die,' and she then handed Mrs. Reilly the bank books which were in the bag, at the same time saying, ' Bury me out of this and whatever is left is yours.' " The statement thus made by Mrs. Hurst was fully corroborated by a witness produced at the trial — Mrs. Madden — who stated that she was present on the occasion referred to by Mrs. Hurst and heard the conversation related by her ; that she saw the bag and saw the intestate take the bank books from it and give them to Mrs. Reilly ; she repeated the conversation which then took place between the deceased and Mrs. Reilly as follows : " We all knew she was sick. Mrs. Reilly said, ' You are pretty sick, auntie,' and she said, ' Yes.' She sat up and she says, ' Yes, I am pretty sick.' She says, ' I think I am dying.' So she says, ' This is all I have. I give you this. If I die, bury me out of this and what is left is yours.' As she made that statement she handed the bundle of books to Mrs. Reilly. Mrs. Hurst was present in the same room and she could hear what was said." These two witnesses were seemingly disinterested. Their testimony was uncontradicted, and there is nothing which tends in the slightest degree to render the same suspicious or to indicate that their statements were not true. Assuming, therefore, that the book in question was one of those then and there delivered by Mrs. Colwell to Mrs. Reilly, I think what was said in connection with the delivery constituted a valid gift *causa mortis*. This was the view entertained by this court in *Podmore v. South Brooklyn Savings Institution* (48 App. Div. 218), where BARRETT, J., said : " There was no reservation or limitation attached to the gift. It was absolute and unconditional. It has been repeatedly held, both in England and in this country, that words of similar import to those here used,

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'take these books and bury me out of them, and what is left out of it is yours,' do not limit or place a condition upon the gift. They simply impose upon the donee a trust duty to pay the expenses of the donor's funeral. (*Hills v. Hills*, 8 M. & W. 401; *Bouts v. Ellis*, 17 Beav. 121; *Blount v. Burrow*, 4 Bro. Ch. C. 72; *Clough v. Clough*, 117 Mass. 83; *Pierce v. Boston Savings Bank*, 129 id. 425; *Curtis v. Portland Savings Bank*, 77 Maine, 151.)"

On the subject of the identification of the book, the evidence is equally satisfactory. Mrs. Madden testified that after the books were taken from the bag and delivered by the deceased to Mrs. Reilly, she put them in a chiffonnier top drawer and two days later she saw Mrs. Reilly take the books from the drawer where she put them and give them to a Mr. Berg; that Mr. Berg gave a receipt for the books, which specified each book and its number; that Mrs. Reilly being unable to read or write, the witness checked off the books specified in the receipt and that there was a Dime Savings Bank book in the list; that this book, with the others, was taken away by Mr. Berg. Mrs. Reilly testified, without objection, that on the twenty-second of November (this was the day Mrs. Madden and Mrs. Hurst testified the books were delivered to Mrs. Reilly) she put the "bundle of books" in the drawer and did not take them therefrom until the twenty-fourth, when she delivered them to Mr. Berg, and he gave her a receipt for them, which she had lost. Mr. Berg testified that he was an attorney at law, and on the twenty-fourth of November, in response to a communication from Mrs. Reilly, he called upon her and she then took from the top drawer of a chiffonnier a bundle of bank books and delivered them to him; that he examined them and gave a receipt for them, in which he specified each book and its number; that one of the books was the one in question; that its number was 204,583; that this book was delivered by him to the defendant and he received the money represented by it. He was corroborated by some of the officers of the bank as to the delivery of the book and payment of the money. The bank was unable to produce the original book, but the fact that the same was delivered to it by Berg was not disputed.

We have, therefore, taking all the testimony together, evidence satisfactorily identifying the book issued by the defendant to Annie Podmore under the name of Annie Colwell, as one of the books

delivered by her to Mrs. Reilly on the twenty-second of November. If I am correct as to the force to be accorded to the evidence above alluded to, then we have a valid gift *causa mortis* of the book in question to Mrs. Reilly, and the defendant was not only justified, but was legally obligated to pay to her the money represented by the book, and could not be thereafter compelled to again pay the same to Mrs. Colwell's estate.

The finding of the jury is against the weight of evidence, and for that reason the judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

MICHAEL CUSHING, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Negligence — collision between a cab and a street car at a street intersection — charge that if, when the cab drove upon the track, the motorman could not avoid the collision by the exercise of ordinary care, the plaintiff could not recover — ordinance giving the car the right of way over the cab — the rights of the parties are governed thereby.

In an action brought to recover damages for personal injuries sustained by the plaintiff in consequence of a collision at a street intersection between a cab which he was driving easterly and one of the defendant's north-bound street cars, a sharp conflict arose upon the trial as to the relative positions of the cab and the car when the plaintiff attempted to cross the track.

Held, that it was improper for the court to refuse to charge that "If the jury in this case find from the evidence that while the defendant's north-bound car was proceeding in the ordinary and lawful course of defendant's business, the plaintiff, while such car was in full sight, drove in front of it at a time when the car was so near that it could not be stopped by the motorman by the exercise of ordinary care, then the plaintiff cannot recover and the defendant is entitled to a verdict;"

That the court having received in evidence without objection a city ordinance providing, "On all the public streets or highways of this city, all vehicles going in a northerly or southerly direction, shall have the right of way over

any vehicle going in an easterly or westerly direction," it was improper for the court to charge that at the place where the collision occurred the rights of the parties were equal, and to refuse to charge that under the ordinance the car had the right of way over the cab.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of April, 1903, upon the verdict of a jury for \$1,000, and also from an order entered in said clerk's office on the 24th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

Charles F. Brown, for the appellant.

Daniel F. Kiely, for the respondent.

McLAUGHLIN, J. :

The plaintiff, the driver of a cab, endeavored about nine o'clock in the evening of the 25th of July, 1900, to cross from the westerly to the easterly side of Third avenue at its intersection with Twentieth street, and in doing so sustained personal injuries by one of defendant's north-bound cars colliding with the cab which he was driving, and he brought this action to recover damages therefor, upon the ground that the same were caused solely by defendant's negligence. He had a verdict, and from the judgment entered thereon defendant has appealed.

The conclusion at which we have arrived renders it unnecessary to determine whether upon all the evidence the finding that the defendant was guilty of negligence and the plaintiff free from contributory negligence was sustained, inasmuch as there are at least two exceptions which necessitate a new trial.

There was presented at the close of the trial a sharp conflict of fact between the witnesses on the part of the plaintiff and those on the part of the defendant as to the relative positions of the car and the cab at the time the plaintiff attempted to cross the tracks upon which the north-bound car was running; the testimony on the part of the plaintiff tended, in substance, to show that the car was about 100 feet away, and on the part of the defendant that it was but a few feet away and so near that the car could not have been stopped

and the collision prevented. This being the situation the court was requested by defendant's counsel to charge: "If the jury in this case find from the evidence that while the defendant's north-bound car was proceeding in the ordinary and lawful course of defendant's business, the plaintiff, while such car was in full sight, drove in front of it at a time when the car was so near that it could not be stopped by the motorman by the exercise of ordinary care, then the plaintiff cannot recover and the defendant is entitled to a verdict." The request was refused, except as charged, and an exception taken. This was error. The request was a proper one and should have been charged. (*Muessman v. Metropolitan St. Ry. Co.*, 76 App. Div. 1.) The court had not covered the proposition in the main charge and the defendant was entitled to have the jury instructed in the manner requested. If the plaintiff started to cross the track on which the car was running when it was so close to him that the motorman could not stop it and prevent the collision, then the plaintiff was not entitled to recover. Nowhere in the charge is the attention of the jury called to this fact, and, therefore, to refuse to charge as requested was in effect to intimate to the jury that they might find for the plaintiff, no matter how close the car was when he drove in front of it. (*Meeker v. Smith*, 84 App. Div. 111.)

During the course of the trial the defendant offered, and the same was received in evidence without objection, an ordinance of the city of New York in relation to the right of way of vehicles upon the public streets which provided that "On all the public streets or highways of this city, all vehicles going in a northerly or southerly direction, shall have the right of way over any vehicle going in an easterly or westerly direction." Notwithstanding this fact the court charged, to which an exception was taken, that the rights of the parties at the place where the collision occurred were equal, and refused to charge, at defendant's request, to which an exception was also taken, that by the ordinance put in evidence the car which was going in a northerly direction had the right of way over plaintiff's cab, which was going in an easterly direction. Both of these exceptions were well taken. The ordinance expressly declares that the rights of the two vehicles were not equal, that the north-bound car had the right of way over the easterly-bound

cab. The charge as made, therefore, was erroneous inasmuch as, taken in connection with the refusal to charge, it was in effect an instruction to the jury that they could disregard the ordinance. This they had no right to do. It was evidence in the case and as such entitled to be considered by the jury.

Other exceptions are urged by the appellant both as to refusals to charge and as to the reception of evidence, but we deem it unnecessary to pass upon them inasmuch as the same may not be presented on a new trial.

It follows that the judgment and order appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN and INGRAHAM, JJ., concurred; PATTERSON, J., concurred on first ground.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

LILLIAN M. THYLL, Appellant, v. THE NEW YORK AND LONG BRANCH RAILROAD COMPANY and THE PENNSYLVANIA RAILROAD COMPANY, Respondents.

Carrier — when an exemption from liability does not apply where the carrier was negligent — the burden of showing negligence is on the shipper — evidence establishing such negligence — liability for damages to goods occurring after possession thereof has been demanded — objection that evidence received generally is not admissible as to one of the defendants — it must be taken at the trial — failure to object to evidence not of the character required by law.

A provision in a contract, under which goods were shipped by rail, that no carrier or party in possession thereof should "be liable for any loss thereof or damage thereto by * * * changes in weather, heat, frost, wet or decay," does not relieve the carrier or a party in possession of the goods from liability to the shipper if, through their negligence, the goods sustain damage from any of the causes mentioned in the contract, but imposes upon the shipper the burden of establishing that the damage was due to such negligence.

Where it appears that the railroad company to whom the goods were first delivered, delivered them to another railroad company and that when the goods

were finally delivered by the latter railroad company to the shipper they were found to be damaged by moisture, and on the trial of an action brought by the shipper against both the railroad companies to recover such damages, the shipper offers in evidence a letter written by a representative of the first-mentioned railroad company stating that the goods were delivered by it to the other railroad company in good order and condition and such letter is received in evidence generally, without objection, the other railroad company cannot successfully contend, for the first time upon appeal, that the letter was not admissible as against it.

Where it appears that the second railroad company received the goods on July 6, 1901, and did not deliver them to the shipper until July 25, 1901, although the shipper inquired for them several times during the interval and was informed that they had not arrived, such railroad company is liable for all damages sustained by the goods during this interval.

What evidence is sufficient to justify a finding that during this interval the goods sustained damage from moisture in consequence of the negligence of the second railroad company, considered.

Where proof which is not of the quality or character required by law is not objected to by the party affected thereby, such party is deemed to assent to this method of proof.

APPEAL by the plaintiff, Lillian M. Thyll, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 7th day of July, 1903, reversing a judgment of the City Court of the city of New York in favor of the plaintiff, entered in the office of the clerk of said court on the 7th day of January, 1903, and also reversing an order of said City Court, entered on the 14th day of January, 1903, denying the defendants' motion for a new trial made upon the minutes.

Theodore T. Baylor, for the appellant.

Robert Thorne, for the respondent New York and Long Branch Railroad Company.

A. Leo Everett, for the respondent Pennsylvania Railroad Company.

MCLAUGHLIN, J.:

This action was brought to recover damages to personal property, alleged to have been caused by defendants' negligence. The plaintiff had a verdict in the City Court and from the judgment entered thereon defendants appealed to the Appellate Term, where the judgment was reversed and a new trial ordered, and by permission the plaintiff appeals to this court.

At the trial it appeared that in May, 1901, the plaintiff shipped from Berlin, Germany, to the city of New York, a hamper of goods consisting mostly of linen articles. When the hamper arrived at New York it was sent to the public stores, and after an examination there it was, on the fifth of July, delivered by an express company acting for the plaintiff to the defendant the Pennsylvania Railroad Company for transportation to Elberon, N. J., a station on the line of the defendant the New York and Long Branch Railroad Company. The Pennsylvania Railroad Company transported the hamper to Elberon, N. J., and on the sixth of July delivered it to the defendant the New York and Long Branch Railroad Company, in whose possession it remained until the twenty-fifth of July, when it was delivered to the plaintiff, and then upon an examination the contents were found to be wet, mildewed and damaged to the extent for which a recovery was had.

The contract under which the hamper was transported by the Pennsylvania Railroad Company provided that no carrier or party in possession thereof should "be liable for any loss thereof or damage thereto, by * * * changes in weather, heat, frost, wet or decay," but this provision of course did not relieve the defendants from liability if the goods were damaged through their negligence. It did, however, impose upon the plaintiff, before she could recover, the burden of establishing that the injury to her property was the result of defendants' negligence. (*Draper v. Prest., etc., D. & H. C. Co.*, 118 N. Y. 118; *Platt v. Richmond, Y. R. & C. R. R. Co.*, 108 id. 358.) There is nothing in the record which would justify a finding to the effect that the Pennsylvania Railroad Company was negligent in any respect as to the transmission of the goods from New York to Elberon, N. J., or in the delivery of the same there to the New York and Long Branch Railroad Company. The proof is uncontradicted to the effect that the hamper was delivered to the Pennsylvania Railroad Company on the fifth of July, and by it transported and delivered to the New York and Long Branch Railroad Company at its station at Elberon, early in the morning of the sixth of July, and while in the possession of the Pennsylvania Railroad Company it was at all times under cover, protected from the weather, and properly cared for. Not only this, but the plaintiff offered in evidence a letter which was received without objection by either of the defend-

ants, in which a representative of the Pennsylvania Railroad Company stated to the plaintiff, prior to the commencement of the action, that the hamper was delivered by the Pennsylvania Railroad Company at the Elberon station to the defendant the New York and Long Branch Railroad Company "in good order and condition."

This, taken in connection with the allegation of the complaint to the effect that the station at Elberon was at the time in question under the control and management of the New York and Long Branch Railroad Company, its agents and servants, would seem to absolve the Pennsylvania Railroad Company from all responsibility as to damage to plaintiff's property.

If I am right in this, then it necessarily follows that the Appellate Term was right in reversing the judgment and ordering a new trial so far as the Pennsylvania Railroad Company was concerned.

As to the New York and Long Branch Railroad Company a different question is presented. The letter referred to, written by the Pennsylvania Railroad Company to the plaintiff, and which was received in evidence without objection, tended to establish that the goods were in good condition when delivered at Elberon. This letter was admitted without qualification, and it does not now lie with the New York and Long Branch Railroad Company to insist that the letter was not competent evidence against it. The letter was proof of a material fact. It was evidence in the case, and as such the jury were bound to give it consideration. A material fact may sometimes be proved by other than strictly legal evidence. As said in *Crane v. Powell* (139 N. Y. 384): "When proof is offered to establish it that is not of the quality or character required by law, and it is not objected to, the other party is deemed to assent to another mode of proof of an inferior or secondary nature." Here the plaintiff, by a declaration of a representative of the Pennsylvania Railroad Company, sought to establish the condition of the goods at the time they were delivered at Elberon. The New York and Long Branch Company did not then see fit to object to such mode of proof so far as it was concerned, and it cannot now be heard to question the method adopted or the force of the evidence adduced for that purpose.

We have, therefore, evidence sufficient to sustain a finding to the effect that the goods were in good condition when they were received

by the New York and Long Branch Railroad Company, and the remaining inquiry is whether there is any evidence to the effect that they were thereafter injured through its negligence. Bearing upon this question the plaintiff proved that the hamper was at that station on the sixth of July; that thereafter she called several times and inquired for it — on each occasion being informed by the representative in charge that it was not there — and she was not, in fact, able to get it until the twenty-fifth of that month. In the meantime it appeared that the hamper was placed in a small freight house which stood “in a hollow on stilts,” which, although it did not leak, had large sliding doors opening opposite each other to the weather; that during the time the hamper remained in the freight house it was rainy and the atmosphere was heavy with moisture, and it is at least inferable from the evidence that the goods could have been injured by reason of such moisture.

I think these facts were sufficient to justify a finding of negligence. The proof showed that the goods were in good condition when delivered at Elberon, and they were thereafter damaged — the only reasonable explanation given as to the cause of such damage being the excessive moisture in the atmosphere. If it had delivered the goods to plaintiff when she first called for them — if this were the cause of the damage — it can fairly be assumed they would not have been injured. The plaintiff was entitled to her goods when she called for them, and the New York and Long Branch Railroad Company having refused to make such delivery became liable for any damage which the goods might thereafter sustain. (*McKinney v. Jewett*, 90 N. Y. 267; *Faulkner v. Hart*, 82 id. 413.)

It follows that the determination of the Appellate Term, in so far as it relates to the Pennsylvania Railroad Company, should be affirmed, with costs to it, and judgment absolute entered in its favor, in pursuance of stipulation; and in so far as it relates to the New York and Long Branch Railroad Company, the same should be reversed, with costs, and the judgment and order of the City Court affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and INGRAHAM, JJ., concurred.

Determination of Appellate Term, so far as relates to the Pennsylvania Railroad Company, affirmed, with costs, and judgment absolute ordered in its favor in pursuance of stipulation; and reversed, with costs, so far as relates to the New York and Long Branch Railroad Company, and judgment of the City Court affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. TWENTY-THIRD STREET RAILWAY COMPANY, Respondent, v. THOMAS L. FEITNER and Others, Composing the Board of Taxes and Assessments of the City of New York, Appellants.

Tax — scope of the statutory writ of certiorari to review an assessment — appointment of a referee to take testimony — it does not preclude a decision that upon the face of the return the tax was invalid — assessment of the capital stock and surplus of a corporation — the debts of the corporation should be deducted — meaning of "capital stock" — the assessors have no power to determine the value of a special franchise — they cannot disregard an unimpeached verified statement filed by the corporation.

The statutory writ of certiorari to review the action of a board of assessors in making an assessment for taxation possesses all the functions of the common-law and Code writs of certiorari, and in addition thereto authorizes a rehearing of the question at issue and the introduction of additional proofs bearing thereon. The enlarged scope of the writ does not change or alter its functions as a writ of review.

The fact that the court, when the case comes on for trial upon the petition, writ and return, decides that testimony is necessary for the proper disposition of the matter, and appoints a referee to take testimony and report to the court his conclusions of law and findings of fact, does not preclude it, where the relator offers no testimony before the referee, but rests its case upon the return, from determining, upon a motion to confirm the referee's report, that it appeared upon the face of the return that the tax was illegal and void.

When assessing the capital stock and surplus of a corporation, the corporation is entitled to have deducted from its personal property the amount of its debts; bonds issued by the corporation constitute an indebtedness.

Capital stock, as that term is used in the Tax Law, does not mean share stock, but is limited to the actual money or property paid in and possessed by the corporation as such.

The assessors have no power to determine the assessable value of a special franchise possessed by the corporation.

Where the corporation delivers to the assessors a statement of its financial condition, verified by the secretary, upon the face of which it appears that

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the corporation has no personal property subject to tax, the assessors have power to examine the officers of the corporation under oath and to require a fuller statement of its property. If, however, they neglect to do this, they are not at liberty to disregard the verified statement.

VAN BRUNT, P. J., dissented.

APPEAL by the defendants, Thomas L. Feitner and others, composing the board of taxes and assessments of the city of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 11th day of November, 1903, confirming the report of a referee appointed to take testimony in a certiorari proceeding and vacating an assessment upon the relator's stock and surplus.

David Rumsey, for the appellants.

Charles F. Brown, for the respondent.

HATCH, J. :

The relator claiming to be aggrieved by an assessment of its capital stock and surplus by taxation for the year 1900 sued out a writ of certiorari to review the action of the board of assessors. The proceeding came on for trial at a Special Term in January, 1901, and upon the petition, the writ and the return thereto the court decided, as recited in the order, that "it appearing to the court that testimony is necessary for the proper disposition of the matter," a referee should be appointed to take testimony and report to the court his findings of fact and conclusions of law. At the hearing before the referee in November, 1902, the relator produced no testimony, but rested its case upon the return of the assessors to the writ of certiorari. Thereupon the defendants moved to dismiss the proceeding upon the ground that it was incumbent upon the relator to prove that the amount of the assessment was erroneous, even though it appeared that there was an error in the method adopted by the assessors in arriving at the amount of the tax. The referee made no ruling upon this motion, but he subsequently made his report, in which he found that the total gross assets of the relator did not exceed \$259,000 on the second Monday of January, 1900, and that the indebtedness of the relator on that date was \$400,000, and as a conclusion of law he found that the assessment was illegal and should be stricken from the assessment roll. Upon motion the

court confirmed the report of the referee and directed that the tax be canceled by the comptroller or other proper officer of the city. From the order entered thereon the defendants appealed.

It is contended on the part of the defendants that upon the conclusion by the court that testimony was necessary for the proper disposition of the matter, the law of the case thereby became established and governed the subsequent procedure, and that under the special statutory writ the court is required to take testimony upon the issues presented by the pleadings and that a trial must be had of such issue; that by adopting the course which obtained the writ herein was changed from one of review of the assessment into a trial upon which judgment of the court is required to be rendered and that the assessment must stand, unless overthrown by proof. The special statutory writ does not cease to be a writ of review by reason of the enlarged scope in the proceedings which may be had thereunder. It was decided by this court in *People ex rel. Citizens' L. Co. v. Feitner* (81 App. Div. 118) that this writ embraces all that is contained in the common law and Code writs of certiorari. It possesses all of the requisites of these two writs and in addition thereto authorizes a rehearing of the question at issue and the introduction of additional proofs bearing thereon. Such was the conclusion reached in *People ex rel. Manhattan R. Co. v. Barker* (152 N. Y. 417). The enlarged scope of the writ, therefore, does not change or alter its functions as a writ of review. The court by deciding in the first instance that testimony was necessary to be given to make proper disposition of the proceeding was not concluded on the motion to confirm the report from determining that upon the face of the return it appeared that the tax was illegal and void. The former decision did not destroy the power to review the return; nor could any estoppel be worked upon the exercise of the judicial function by an erroneous determination that testimony was necessary to dispose of the questions presented by the return. There is, therefore, no error in procedure which calls for a reversal of this order, and the only question to be considered is whether the return itself shows that the tax was illegal.

It appeared from the return that the assessors required and the relator delivered a statement showing its financial condition, which statement was verified by the oath of Charles E. Warren, the

secretary of the relator, and was presented to the assessors before the assessment was made. None of the facts appearing in this statement are contradicted by the return, and upon the face of the statement it appears that relator's liabilities and the assessed value of its real estate of \$81,000 amounted to \$222,000 more than the value of all its property, thus showing that there was no personal property owned by the relator which could properly be made the subject of a tax. It was entitled to have deducted from its personal property the amount of its debts (*People ex rel. Cornell S. Co. v. Dederick*, 161 N. Y. 195), and the debts were conceded to amount to \$400,000.

The method of making up the assessment was clearly erroneous. The defendants first took the capital stock at par, added thereto the premium at which the share stock was selling in the market, also added the par value of the bonds, \$400,000, which was a debt. The sum total produced by this method was \$2,692,000. They then deducted the assessed value of the special franchise, assessed valuation of the real estate, debts and ten per centum of surplus capital, which aggregated \$2,489,276, which deducted from the assets left the sum of \$202,724, which was the amount of the tax. The par value of the capital was \$600,000. The premium upon the share stock, which the assessors added thereto, was \$1,692,000. The method, therefore, by which the value of the capital stock was arrived at was clearly erroneous. Capital stock, as that term is used in the Tax Law (Laws of 1896, chap. 908, § 12), does not mean share stock; it is limited to the actual money or property paid in and possessed by the corporation as such. (*People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433; *People ex rel. Manhattan R. Co. v. Barker*, 146 id. 304.) The assessors also assumed to determine the assessable value of the franchise of the corporation. This was also erroneous. (*People ex rel. Brooklyn R. R. Co. v. Neff*, 19 App. Div. 590; *affd. on opinion below*, 154 N. Y. 763.) The share stock is represented by the franchise, and it was not assessable for local purposes until the passage of the Special Franchise Tax Law (See Laws of 1899, chap. 712), and under that law the assessors have no jurisdiction to determine its assessable value. While the commissioners had power and authority to examine the officers of the relator under oath, and to require a fuller statement of all its property, and

by oral examination under oath could compel a complete disclosure of all matters concerning the property owned by the relator, it could not dispense with such examination and disregard the statement which had been furnished upon the commissioners' requirement. Having received this statement and made no further inquiries concerning the same, and requiring neither an examination nor a fuller statement, it was not at liberty to disregard the facts contained therein, which have been verified by the oath of one of relator's officers. (*People ex rel. Edison G. E. Co. v. Barker*, 141 N. Y. 251; *People ex rel. Consolidated Gas Co. v. Feitner*, 78 App. Div. 313.) It is said, however, that even though the commissioners adopted an erroneous method of assessment, yet that such fact, standing alone, is not sufficient to call for the cancellation of this tax, for the reason that the relator does not show that it is aggrieved thereby. So far as the statement itself is concerned, it shows upon its face that the relator has no personal property which is the subject of a tax, and if it has no property, then it cannot be called upon to pay any tax and it is necessarily aggrieved thereby.

The cases relied upon in support of defendants' contention (*People ex rel. United Verde Copper Co. v. Feitner*, 54 App. Div. 217; *affd.* on opinion below, 165 N. Y. 645; *People ex rel. Equitable G. L. Co. v. Barker*, 66 Hun, 21; *affd.*, 137 N. Y. 544) and others do not meet the case. In all of them the statement which was made the basis for the tax by the relator showed taxable property equal in amount to the assessment. The statement in the present case shows the reverse; in consequence of which it is made to appear that there was no personal property subject to taxation.

It follows from these views that the order appealed from should be affirmed, with costs.

PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

VAN BRUNT, P. J. (dissenting):

I dissent. This court has held, as I understand it, that the writ of certiorari in a tax case is not a writ of review, but the relator is entitled as matter of right to a reassessment by the Supreme Court.

Order affirmed, with costs.

In the Matter of the Application of the CITY OF NEW YORK, Relative to Acquiring Title, Wherever the Same Has Not Been Heretofore Acquired, to All Such Real Estate, and to any Right, Title and Interest Therein, Not Owned by the City of New York, Which Shall Be Embraced Within the Lines of Riverside Drive and Parkway (Although not yet Named by Proper Authority) from One Hundred and Thirty-fifth Street to the Boulevard La Fayette, in the Twelfth Ward, Borough of Manhattan, in the City of New York, as Laid Out and Established by the Board of Street Opening and Improvement, in Pursuance of Chapter 665 of the Laws of 1897.

In the Matter of the Application of ELLA L. DORSETT, Appellant for a Peremptory Writ of Mandamus against EDWARD M. GROUT as Comptroller of the City of New York, Respondent.

Land taken to extend Riverside drive in New York city — award embracing the value of the land and interest thereon to the date of the report — the landowner is entitled to interest on the entire award — when the rule that an excessive demand is ineffectual to set interest running does not apply.

Commissioners of estimate and assessment appointed in a proceeding instituted under chapter 665 of the Laws of 1897, for the extension of Riverside drive in the city of New York, awarded a landowner \$11,500 as the value of the land taken, and also the further sum of \$1,508.41 as interest thereon from September 22, 1900, the date when the title vested in the city, to November 29, 1902, the date of the report, making a total of \$13,008.41. April 23, 1903, after the report of the commissioners had been confirmed, the property owner filed a demand for the payment of the award.

Held, that the landowner was entitled to receive \$13,008.41, with interest thereon from November 29, 1902, the date of the report, to the time when payment was made, and not simply \$11,500, with interest thereon from September 22, 1900, the date when the title vested in the city, to the time when the report was confirmed;

That the amount designated as interest in the award made to the property owner was not awarded to her as such, but as a part of the damages which she had sustained, and that consequently she was entitled to interest on the entire award.

Some, that the rule that an excessive demand is ineffectual to set interest running upon the sum actually due is of doubtful application where the whole amount of money which the party is entitled to receive is liquidated and the only question relates to interest. Under such circumstances, if the comptroller deems the demand excessive, he should offer to pay the sum concededly due.

LAUGHLIN, J., dissented.

APPEAL by the petitioner, Ella L. Dorsett, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of January, 1904, denying the petitioner's motion for an order directing the comptroller of the city of New York to pay to her additional interest claimed by the said petitioner upon an award made in her favor.

James A. Deering, for the appellant.

John P. Dunn, for the respondent.

HATCH, J. :

This controversy arises upon a difference of opinion as to the amount of interest to which the appellant was entitled on July 17, 1903. Under chapter 665 of the Laws of 1897 the city was authorized to extend Riverside drive. The commissioners of estimate and assessment completed and signed their report November 29, 1902. Under the terms of the act title to the land vested in the city September 22, 1900. The commissioners in their report awarded to the relator for the land taken the sum of \$11,500 as the value of such land on the 22d day of September, 1900, when title vested in the city, and the further sum of \$1,508.41 interest thereon from the date of the vesting of title to the date of their report, making the total award \$13,008.41. On April 23, 1903, the appellant relator filed a demand with the comptroller for the payment of this sum of \$13,008.41, with interest thereon from the 29th day of November, 1902, the date of the report. On July 17, 1903, the comptroller had a warrant ready to pay what he considered was the amount due to the appellant, to wit, \$13,272.91, which represented \$11,500, with interest from September 22, 1900, to April 17, 1903, the date of the confirmation of the report. The appellant claimed that upon that date the amount due was \$13,498.39, a difference of \$225.48. The appellant received the warrant drawn by the comptroller as a payment on account without waiving her claim for the full amount of all she claimed. She then made an application for a peremptory writ of mandamus to compel the comptroller to audit the balance of the amount claimed by her, and from the order denying such application this appeal is taken.

The act under which this award was made provides in section 6

that upon the confirmation by the court of the report of the commissioners of estimate and assessment, the award, with interest, costs and expenses, shall become due and payable, and that the owner, in case of the failure of the comptroller of the city to pay the same within thirty days after a demand therefor, may apply to the court, and the court shall require the comptroller to pay the award, with costs and expenses. The real controversy which this case presents is as to whether the landowner was entitled to interest upon that part of the award which gave interest upon the value of the land as found in the award. If so, then the demand which was made by the landowner upon the city was a proper demand, as it would be of the amount due. As the city was authorized to take possession of the land prior to the confirmation of the award, the landowner was deprived of its use, and interest was awarded to him as compensation therefor. This was equitable, as without it the owner would be deprived of the use of the land and also of the use of the money awarded as its value. When, however, the award was made, it was of a sum of money which represented the entire interest in the land. A part was for the value and a part for the value of the use, and these two items measured the sum of money which the owner on the day of the confirmation of the report became entitled to receive at the hands of the city. It seems to be not of consequence that the amount awarded was made up of the value of the land and the value of the use of the land after possession was taken by the city. The owner was entitled to both, as a measure of just compensation for what had been taken from him. The two items, therefore, constituted the fund which she became entitled to receive, and as such fund represented her whole interest in the property of which she had been deprived she became entitled to the payment of interest by the city upon the one part as much as upon the other. Interest upon the award at the prevailing rate was adopted to measure the damage which the claimant had sustained on account of the proceedings *in invitum*. Calling it interest and placing it in a separate item did not change the fact that it represented the value of the land to the owner at the time when it was taken and paid for; consequently, there is no basis for any distinction between interest upon one sum and interest upon the other sum, as the owner was entitled to the whole, and

being so entitled, her demand was a proper demand, with which the city should have made compliance. Such rule does not compound interest as applied to this situation. It was not awarded to her as such, but as damages for the taking. This view renders it unnecessary to consider whether the demand, if for too much, under the circumstances of this case, would have set interest running or no. There are cases cited by the learned counsel for the respondent which hold that where the demand is for too much, it is ineffectual to set interest running upon a lesser sum which may be due. (*Carpenter v. City of New York*, 44 App. Div. 230.) Such rule, however, may be of doubtful application to a case where the amount of the whole sum to which the owner is entitled is known, and it is not complicated by mortgages, taxes and other liens, which, of themselves, make the specific amount due unliquidated. It may be doubtful, however, whether that rule applies where the whole amount of money which the party is entitled to receive is liquidated and known, and the only question relates to interest. Under such circumstances, when a demand is made, if the comptroller deems it to be for more than the sum due, he should offer to pay the sum concededly due, in order to protect the city from the interest charge. But however this may be, we think the two amounts in the present case constituted a single fund, which was awarded to the owner as value and damages for the taking of her land, and that, therefore, she was entitled to interest upon the whole sum, and the demand was for the sum to which she was entitled. This conclusion requires a reversal of this order.

The order should, therefore, be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON and INGRAHAM, JJ., concurred.

LAUGHLIN, J. (dissenting):

This is an appeal from an order denying an application for a peremptory writ of mandamus to compel the comptroller of the city of New York to pay the relator a specific sum of money claimed to be due and payable as a balance of interest on an award for lands taken in eminent domain proceedings. In my opinion, the right of the relator to interest is governed by chapter 665 of the Laws of 1897, being a special act relating to River side drive as distinguished from

the general charter provisions. It is conceded that pursuant to the provisions of this special act the title to the land for which the award was made vested in the city on the 22d day of September, 1900. Section 6 of said chapter 665 of the Laws of 1897 provides, among other things, that the damages awarded by the commissioners of estimate and assessment when confirmed by the court, together with interest thereon from the date when the title to the lands vested in the city as therein provided shall become due and payable. In view of this provision the commissioners had no authority to award interest. They were merely authorized to determine the value of the land and other damages, if any, as of the date when title vested in the city and upon confirmation of their awards by the court interest upon the award from the time title vested follows as a matter of course. It appears that the commissioners acting according to the practice prescribed by the charter in other cases (See Laws of 1897, chap. 378, §§ 990, 1001, as amd. by Laws of 1901, chap. 466) determined the awards as of the date when title vested in the city, but added thereto interest from such date to the time of filing their report. The comptroller in arriving at the amount payable to the relator accepted this computation of interest, but computed interest not upon the amount of the award, together with such interest added by the commissioners, but merely upon the award, exclusive of interest, from the date of the report of the commissioners to the time the order of confirmation was granted. This, of course, produced the same results as if the computation of the commissioners had been disregarded and interest had been computed upon the award from the date when title vested in the city to the date of the confirmation of the report. The contention of the relator is that she should receive interest on the gross amount awarded, which included interest as stated, from the date of the report of the commissioners to the time the award was paid. The views already expressed show that this claim is erroneous in so far as it would give the relator interest upon the interest computed and awarded by the commissioners from the date of their report until it was confirmed. The interest thus erroneously claimed is included in the amount for which a peremptory writ of mandamus is demanded and, therefore, the writ was properly denied, notwithstanding that the relator may have a valid claim for some balance of interest, because in man-

damus proceedings there must be a precise demand and for the relief to which the petitioner is entitled and the court is justified in denying the application if the petitioner has not a clear legal right to the precise relief for which he prays.

I am also of opinion that the relator's right to interest after the confirmation of the report of the commissioners is not governed by the charter provisions and that under the well-settled rules applicable to municipal corporations interest would not run on the award until the making of a demand therefor. The report of the commissioners was confirmed on the 17th day of April, 1903, and no demand was made until six days thereafter. I think that during this time interest did not run. The demand made on the 23d day of April, 1903, was erroneous in that it demanded the compound interest already stated and to which, I think, the relator was not entitled. Were it not for the decision of this court in *Carpenter v. City of New York* (44 App. Div. 230) I would be inclined to hold that interest should run from the date of this demand because the property owner then appeared and manifested a desire to receive and a willingness to accept his award, and even though he computed and claimed interest on an erroneous basis I should think the city, in order to stop interest running upon the award was called upon to tender the amount to which he was legally entitled. However, in view of that decision, which I think is not distinguishable on principle from this and should, therefore, be followed, it would seem that the demand was ineffectual to set interest running and the relator, upon my view of the law, was not entitled to any interest after the confirmation of the report.

On the 17th day of July, 1903, the relator received from the comptroller the amount of the award, less the interest added by the commissioners, and interest thereon from the time the title vested until the date of the confirmation of the report. This was the full amount to which he was entitled. The denial of the writ may also be sustained, therefore, upon the ground that no part of the claim is meritorious.

I, therefore, vote for affirmance.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

THOMAS FARRELLY, as Temporary Administrator, etc., of FRANK J. SMITH, an Absentee, Appellant, v. THE EMIGRANT INDUSTRIAL SAVINGS BANK and PATRICK REILLY, as Administrator, etc., of MARGARET REILLY, Deceased, Respondents.

Savings bank deposit — change of the account by the depositor so as to read "In account with Margaret Smith (the depositor), or son Frank J." — delivery of the bank book to a third person with instructions to deliver it to the son — the son takes the deposit if he survives his mother — quære whether the transaction constituted a gift inter vivos.

Evidence that one Margaret Smith who had opened a savings bank account in her own name subsequently procured the passbook to be changed so as to read, "In account with Margaret Smith or son Frank J.," and that a short time prior to her death she gave the passbook to her sister with directions to keep the same for her son, whose whereabouts were then unknown, and if he came back to give it to him, is sufficient to authorize a finding that it was the intent of the mother to make her son a joint owner with her in the fund, and that upon the death of the mother leaving the son surviving, the son took immediate title to the fund by right of survivorship, even though the passbook was not delivered to him during his mother's lifetime.

Quære, whether the delivery of the passbook by the said Margaret Smith to her sister under the instructions set forth above, established a gift *inter vivos* of the bank account to her son.

APPEAL by the plaintiff, Thomas Farrelly, as temporary administrator, etc., of Frank J. Smith, an absentee, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 18th day of November, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint and adjudging the defendant administrator to be entitled to a certain fund on deposit in the defendant bank.

Lawrence E. Brown, for the appellant.

James J. Fitzgerald, for the respondents.

HATCH, J.:

This action was brought to determine the ownership of a fund deposited in the defendant savings bank by Margaret Smith. The

account appears to have been opened in her name on the 13th day of October, 1874, upon which date a deposit was made of \$1,900, and a passbook issued to her. She thereafter appears to have made deposits in various amounts in the account down to about July 24, 1880, when the passbook was changed at her instance so as to read, "in account with Margaret Smith or son Frank J." Several deposits were made thereafter, the last of which was under date of January 6, 1886. The amount of the account upon the 7th day of October, 1903, the date of the trial, was \$3,763.49. Margaret Smith at the time of opening the deposit was a widow; her only child was Frank J. Smith; his father died during his early infancy. Many years after the death of her husband Margaret Smith married the defendant Patrick Reilly, with whom she continued to live down to the date of her death, which occurred on the 17th day of April 1886. At the time of her death the whereabouts of her son Frank J. Smith were unknown, and whether he was alive or dead at that time is not made to appear in this record. A short time prior to the death of Margaret Smith Reilly she gave the passbook to her sister Ellen Bannon, with the direction that she keep the same "for Frank, and if her son came back to give it to him." Subsequently Mrs. Bannon, who has since become and now is hopelessly insane, gave the book to a cousin, who was the wife of Patrick Reilly, but who was not the defendant Reilly, although of the same name Mrs. Reilly retained the book for some time and then gave it to her husband. He kept it for many years when he was directed by the Surrogate's Court to deliver it to the defendant administrator of Margaret Smith Reilly, deceased.

The plaintiff seeks to sustain his right to the fund upon the theory of a gift *inter vivos* from Margaret Smith Reilly, the mother, to the son, Frank J. Smith. The court below held, and it may be, that the evidence was insufficient to support the action upon the theory of a gift *inter vivos*. (*Mack v. Mechanics & Farmers' Savings Bank*, 50 Hun, 477.)

There is some authority for holding that the change in the form of deposit, by which the son was enabled to draw equally with the mother, is evidence of an intent upon the part of the mother to constitute the son a joint owner with her in the fund. Whether the deposit standing alone, disassociated from any other fact, would

have such effect it is not necessary for us now to determine, and we express no opinion thereon. Taking into consideration, however, the form of the deposit, the delivery of the book with directions to deliver to the son, it would clearly authorize the court to find that it was the intent upon the part of the mother to vest in the son a joint ownership with her of the money, and being vested with such ownership the survivor would take the whole. (*McElroy v. National Savings Bank*, 8 App. Div. 192; *Matter of Meehan*, 59 id. 156; *Mack v. Mechanics & Farmers' Savings Bank*, *supra.*) *Matter of Bolin* (136 N. Y. 177) is not in conflict with this view. That decision is to be limited to the particular facts upon which it was based. All it decides is that, under the circumstances which were made to appear therein, the only purpose of depositing in the names of both was for matter of convenience, and such fact appearing it was held to destroy the force and effect of the deposit in the joint names as constituting a joint tenancy. Where, however, the deposit is in joint names and the intent appears to create the joint tenancy, its effect is to vest title to the whole fund in the survivor, and under such circumstances, whether the book be delivered to the survivor or not, or whether he ever has had it in his possession during the lifetime of his joint owner, is not of consequence, as the intent existing to create the relation of a joint tenancy, title vested in the survivor *eo instanti* upon the death of the joint owner, and no delivery of anything is necessary to effectuate such result. We think there can be little doubt in the present case but that the intent of the mother was to make her son joint owner with her in the fund, in consequence of which he took immediate title if he survived the mother. It became, however, incumbent upon the plaintiff to show such survivorship, and in this he failed. The only proof given upon the subject was that the son, Frank J. Smith, visited his mother about two years before she died. In 1881 she received a letter from him from Denver, in Colorado, as we assume. So far as it is made to appear, all trace of him since that time has been lost. The mother did not die until the 17th day of April, 1886. There is no evidence showing that upon that date Frank J. Smith was alive; consequently it is not made to appear that he was the survivor of his mother, and, therefore, the plaintiff shows no title in himself to this fund.

It follows that the judgment was correct, and it should, therefore, be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

WALTER LEWISOHN and Others, as Executors of and Trustees under the Last Will and Testament of LEONARD LEWISOHN, Deceased, Respondents, v. ROSALIE V. HENRY and LEONORE GLADYS HENRY, Appellants, Impleaded with PHILIP S. HENRY, Individually and as Administrator, etc., of FLORENE L. HENRY, Deceased, Respondent.

Will — devise of the residuary estate in trust for the testator's children — provision that certain portions of the trust fund be paid to each beneficiary when she attained the age of twenty-five and thirty years, and that upon her death the balance be paid to her appointees, or, in the absence of such appointment, to her issue — devolution of the trust fund where one of the beneficiaries dies before reaching the age of twenty-five years, leaving a husband and children — when the punctuation of a will should be disregarded.

The will of Leonard Lewisohn directed his executors to divide his residuary estate, both real and personal, "into such number of equal shares as shall be equal to the number of children who shall survive me, and of my children, who shall have died before me leaving issue who shall survive me, and set apart one of such equal shares for each of my children who shall survive me, and one of such equal shares for the issue of each child of mine who shall have died before me, leaving issue me surviving; and convey, transfer, deliver and pay over one of such equal shares to the issue of each one of my children who shall have died before me leaving issue me surviving, in equal shares, *per stirpes* and not *per capita*, to whom I give, devise and bequeath the same accordingly; and that my said executors set apart one of such equal shares for the benefit of each of my children who shall survive me, and I give, devise and bequeath the same to my said executors and to such of them as shall qualify and act; as trustees to have and to hold each share so set apart for the benefit of a child of mine (or the portion thereof not paid over and transferred to such child as hereinafter directed) upon a separate trust, for the benefit of such person for whom or for whose benefit the same shall have been set apart as aforesaid during his or her natural life, * * * and after paying thereout all lawful expenses and charges to apply the net income from the said trust estate arising from time to time as received, to the use of the person in trust

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for whom such trust estate shall be held as aforesaid for so long during the life of such person as he or she shall remain under the age of twenty-five years, the income of any such share held in trust for any daughter of mine to be free from the debts, control or interference of any husband she may have; and upon the arrival at the age of twenty-five years of the person in trust for whom such trust estate shall be so held, to convey, transfer, deliver and pay over one equal fourth part of the capital of such trust estate with all gains and increase of capital thereof, if any, in fee simple and absolutely to such person."

The will further provided that thereafter the executors should hold the balance of the trust estate upon a similar trust until the beneficiary should reach the age of thirty years, at which time they were directed to pay to the beneficiary in fee simple one equal third part of the capital of the trust estate then remaining; that thereafter and during the residue of the life of the beneficiary the executors should hold the balance of the trust estate upon a similar trust.

The will then directed the executors "upon the death of such person in trust for whom such trust estate shall be held, to convey, transfer, deliver and pay over the capital of such trust estate as it shall then exist with all gains and increase of capital thereof, if any, in fee simple and absolutely to such person or persons and in such shares and proportions as the person in trust for whom such trust estate shall have been held shall by will direct and appoint; and in default of such direction or appointment, or in so far as such direction or appointment may not extend or be effectual, to the issue then surviving of such person in trust for whom such trust estate shall have been held, in equal shares *per stirpes* and not *per capita*."

One of the testator's daughters, for whom, pursuant to the will, one-ninth of the residuary estate had been set apart in trust, died intestate before attaining the age of twenty-five years leaving her surviving two children and a husband.

Held, that the testator did not intend that any part of the trust fund should vest absolutely in his surviving children until the arrival of the various periods fixed for distribution, and then intended the trust estate to vest in the surviving children only as to the part to be distributed;

That the one-half of the trust estate designed to be paid over to the testator's deceased daughter in installments payable when she attained the age of twenty-five and thirty years respectively did not vest in such daughter immediately upon the testator's death, and pass to the husband and children of the testator's deceased daughter as her next of kin;

That the provision of the will governing the disposition of the trust fund upon the death of a beneficiary had reference to the death of a child of the testator occurring at any time subsequent to the testator's death and not to the death of a child occurring after such child had attained the age of thirty years;

That the children of the testator's deceased daughter took the entire trust fund under this provision of the will and did not take any part thereof as next of kin of their mother.

The punctuation of a will must be disregarded if it is in conflict with the testamentary scheme of the testator as gleaned from the provisions of the will, or prevents ascribing to the words employed their ordinary meaning.

APPEAL by the defendants, Rosalie V. Henry and another, by Campbell E. Locke, their guardian ad litem, from certain portions of a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 30th day of October, 1903, as resettled by an order entered in said clerk's office on the 4th day of December, 1903, upon the report of a referee, construing the will of Leonard Lewisohn, deceased.

The action is brought by the executors of the last will and testament of Leonard Lewisohn for the construction of his will. The controversy arises over the construction of the 7th clause or paragraph of the will, which is as follows: "I direct that my executors hereinafter named, or such of them as shall qualify and act, divide all the rest, residue and remainder of the property and estate, both real and personal, of every kind and description and wheresoever situated which shall belong to me or be subject to my disposal at the time of my death, into such number of equal shares as shall be equal to the number of children who shall survive me, and of my children, who shall have died before me leaving issue who shall survive me, and set apart one of such equal shares for each of my children who shall survive me, and one of such equal shares for the issue of each child of mine who shall have died before me, leaving issue me surviving; and convey, transfer, deliver and pay over one of such equal shares to the issue of each one of my children who shall have died before me leaving issue me surviving, in equal shares, *per stirpes* and not *per capita*, to whom I give, devise and bequeath the same accordingly; and that my said executors set apart one of such equal shares for the benefit of each of my children who shall survive me, and I give, devise and bequeath the same to my said executors and to such of them as shall qualify and act; as trustees to have and to hold each share so set apart for the benefit of a child of mine (or the portion thereof not paid over and transferred to such child as hereinafter directed) upon a separate trust, for the benefit of such person for whom or for whose benefit the same shall have been set apart as aforesaid during his or her natural life, which trust as to each share of such property or estate by this article of my will hereinbefore directed to be held in trust for the benefit of a child of mine shall be to collect and receive the rents, issues, income and profits of so much thereof as shall be real

property and to invest and keep invested so much thereof as shall be personal property with power to call in and change the investments thereof from time to time and to collect and receive the income thereof, and after paying thereout all lawful expenses and charges to apply the net income from the said trust estate arising from time to time as received, to the use of the person in trust for whom such trust estate shall be held as aforesaid for so long during the life of such person as he or she shall remain under the age of twenty-five years, the income of any such share held in trust for any daughter of mine to be free from the debts, control or interference of any husband she may have; and upon the arrival at the age of twenty-five years of the person in trust for whom such trust estate shall be so held, to convey, transfer, deliver and pay over one equal fourth part of the capital of such trust estate with all gains and increase of capital thereof, if any, in fee simple and absolutely to such person; and after such person in trust for whom such trust estate shall be held in trust as aforesaid shall have attained the age of twenty-five years, thenceforward for so long during the natural life of such person as he or she shall remain under the age of thirty years to continue to hold the residue of such trust estate in trust, to collect and receive the rents, issues, income and profits of so much thereof as shall be real property, and to invest and keep invested so much thereof as shall be personal property, with power to call in and change the investments thereof from time to time and to collect and receive the income thereof, and, after paying thereof all lawful expenses and charges, to apply the net income from the said trust estate arising from time to time as received to the use of the person in trust for whom such trust estate shall be held as aforesaid, the income of such trust estate held in trust for any daughter of mine to be free from the debts, control or interference of any husband she may have; and upon the arrival at the age of thirty years of such person in trust for whom such trust estate shall be held to convey, transfer, deliver and pay over one equal third part of the capital of such trust estate then remaining, including all gains and increase of capital thereof, if any, in fee simple and absolutely to such person in trust for whom such trust estate shall be held; and from and after such person shall have attained the age of thirty years thenceforward, during the residue of the natural life of such

person in trust for whom such trust estate shall have been held to continue to hold the residue of such trust estate in trust to collect and receive the rents, issues, income and profits of so much thereof as shall be real property, and to invest and keep invested so much thereof as shall be personal property, with power to call in and change the investments thereof from time to time, and to collect and receive the income thereof, and, after paying thereout all lawful expenses and charges, to apply the net income from the said trust estate arising from time to time as received to the use of the person in trust for whom such trust estate shall be held as aforesaid, the income of any such trust estate held in trust for any daughter of mine to be free from the debts, control or interference of any husband she may have, and upon the death of such person in trust for whom such trust estate shall be held, to convey, transfer, deliver and pay over the capital of such trust estate as it shall then exist with all gains and increase of capital thereof, if any, in fee simple and absolutely to such person or persons and in such shares and proportions as the person in trust for whom such trust estate shall have been held, shall by will direct and appoint; and in default of such direction or appointment, or in so far as such direction or appointment may not extend or be effectual, to the issue then surviving of such person in trust for whom such trust estate shall have been held, in equal shares *per stirpes* and not *per capita*, or if such person in trust for whom such trust estate shall have been held as aforesaid shall leave no issue him or her surviving, to the next of kin of such person in trust for whom such trust estate shall have been held, in the shares and proportions to which under the laws of the State of New York as they shall then exist, they would be entitled to the same, if the same were personal property and such person in trust for whom such trust estate shall have been held had died possessed thereof intestate."

The testator left four sons and five daughters, one of whom was Florine L. Henry, the mother of the appellants, who subsequently died, before attaining the age of twenty-five years, without having made the appointment authorized by the 7th clause of the will. She died intestate, leaving the appellants, her sole issue, and a husband, the respondent Henry, their father, who was appointed administrator of her estate. The executors of Lewisohn qualified

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and divided the remainder of his estate into nine separate equal shares and set apart one of these for the mother of the appellants, as directed in the will, and during her lifetime paid her the income thereof. The surviving husband, claiming that one-half of the part of the estate so set apart and held in trust for his wife, which was to be paid to her in installments upon her attaining the age of twenty-five and thirty years, respectively, vested in her, in his capacity as administrator, demanded that the executors pay the same over to him. The executors being in doubt as to the true construction of the will in this regard, thereupon brought this action to have it judicially construed. The referee decided that one-half of the share or part of the estate so set apart for the benefit of the mother of the appellants vested in her upon the death of the testator and awarded judgment accordingly.

Campbell E. Locke, for the appellants.

P. J. Rooney, for the defendant respondent.

LAUGHLIN, J.:

The executors were directed by the 7th clause of the will to divide the rest, residue and remainder of the estate of the testator into a number of equal shares, equal in number to the number of his children living at the time of his death and of his deceased children leaving issue surviving him, and to set apart one of such shares for each surviving child and one for the surviving issue of each deceased child. The executors were then directed to "convey, transfer, deliver and pay over one of such equal shares to the issue" of each deceased child in equal shares "*per stirpes* and not *per capita*, to whom I give, devise and bequeath the same accordingly." Here we find specific provisions with reference to the death of any of the children of the testator during his lifetime. Grandchildren, surviving the testator, being the issue of a predeceased child, were to take at once without their share being held in trust at all. Consequently, the disposition of the principal upon the death of a beneficiary made towards the end of the 7th clause of the will, must have reference to the death of a child and to one occurring subsequent to the death of the testa-

tor. The appellants contend that the clause in which this reference to the death of a child is made is unqualified and that it includes a death at any time thereafter. The respondent on the other hand claims that it only relates to a death of a surviving child after attaining the age of thirty years and that, therefore, the part of the will in which it occurs merely disposes of the remaining half of the separate share set apart for the benefit of the mother of the appellants. This argument proceeds upon the theory that the testator did not contemplate a death of any of his surviving children before attaining the age of thirty years and that, under the rule which favors the vesting of estates, the undivided half which the executors are directed to pay over to each child in installments on arriving at the age of twenty-five and thirty years respectively, vested absolutely in the mother of the appellants upon the death of the testator. If the undivided half of the mother's share thus set apart and held in trust for her benefit vested absolutely in her as claimed by the respondent, then upon her death it was payable to her administrator and the appellants take as her next of kin subject to the interest of their father; but if it did not vest in the mother, the appellants take directly under the will and the husband and father has no interest. The practical question for decision is, therefore, whether the appellants take as next of kin of their mother or under the will of their grandfather. In this view, if the appellants take under the will it is immaterial whether the undivided half of the separate trust fund in question vested in the trustees until the time fixed for distribution, or whether it vested in the mother of the appellants subject to be divested upon her death before the distribution period. This depends upon the intent of the testator. We must ascertain his intent by considering all of the provisions of his will. On a casual reading, the punctuation would seem to indicate that the disposition of the trust fund in case of the death of a beneficiary relates to the trust fund remaining in the hands of the trustee after the beneficiary has attained the age of thirty years, which would be one-half the principal of the share originally. On a closer examination, however, it will be discovered that the will has not been punctuated with any degree of accuracy or even systematically and, therefore, the punctuation is of little value as an aid to the true construction. Moreover, it is to be borne in mind that punctuation

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must be disregarded if it is in conflict with the testamentary scheme of the testator as gleaned from the provisions of the will or prevents ascribing to the words employed their ordinary meaning. (*Roe v. Vingut*, 117 N. Y. 204; *Kinkele v. Wilson*, 151 id. 269.) There is no express devise or bequest of any of the separate trust funds to any of the surviving children. On the contrary, on the division of the remainder into these separate shares, each separate share set apart for the benefit of a surviving child is expressly given, devised and bequeathed to the executors as trustees in trust to collect and receive the rents, issues, income and profits of the real estate and to invest and keep invested the personal property, with power to call in and change the investments from time to time and apply the net income to the use of the child for whose benefit the separate trust is created during life, with a provision that upon the beneficiary arriving at the age of twenty-five years the trustees shall "convey, transfer, deliver and pay over one equal fourth part of the capital," and upon the beneficiary attaining the age of thirty years to pay over in like manner one-third of the remainder. The testator, by repeatedly providing that the income paid to any of his daughters should be free from the debts, control or interference of her husband, and by providing that in the event of the death of any of his children without exercising the power of appointment, the share held in trust for such child should go to his or her issue, if any survive him, and making no provision for a surviving husband or wife, shows quite clearly that he did not intend that the trust fund should vest absolutely in his children until the arrival of the period fixed for distribution, and then only as to the part to be distributed. Until the period for distribution his children were only entitled to the net income, and, therefore, it could be of no personal advantage or benefit to them to have the estate vested in them in the meantime. If any beneficiary having issue desired that any part of the trust fund should go to another or others than his or her issue, the power of appointment was given to otherwise dispose of all or any part of it. Moreover, it was essential for the due performance of the trust that the trustees should be vested with the complete title to the property. We are, therefore, of opinion that the appellants took under the will and not as next of kin of their mother.

It follows that the judgment should be modified in accordance with these views, with costs to the guardian *ad litem* payable out of the fund.

VAN BRUNT, P. J., PATTERSON and HATCH, JJ., concurred.

INGRAHAM, J. (concurring):

I concur with Mr. Justice LAUGHLIN in the construction given to the 7th clause of the will in question, as it seems to me that the intention of the testator is clearly expressed. The property devised and bequeathed to the executors in trust is to be divided "into such number of equal shares as shall be equal to the number of children who shall survive me, and of my children, who shall have died before me leaving issue who shall survive me, and set apart one of such equal shares for each of my children who shall survive me, and one of such equal shares for the issue of each child of mine who shall have died before me, leaving issue me surviving." The trustees were then directed to hold one share for each of his surviving children, to collect and receive the rents, issues, income and profits from such share and to apply the net income to the use of the person for whom such share shall be held during the life of such person, or until such person arrives at the age of twenty-five years, and upon the arrival of such person at the age of twenty-five years, to convey or pay over one equal fourth part of the capital of such trust estate, to receive the income upon the remaining three-fourths and to pay it to the person for whom the trust was held until such person arrived at the age of thirty years, when there was to be conveyed and paid to such person one-third of the capital of the trust estate then remaining, and to hold the balance of the trust during the lifetime of the person for whom the trust was held and to pay the income and profits to such person during his life. It is then provided that "upon the death of such person in trust for whom such trust estate shall be held, to convey, transfer, deliver and pay over the capital of such trust estate as it shall then exist with all gains and increase of capital thereof, if any, in fee simple and absolutely * * * to the issue then surviving of such person in trust for whom such trust estate shall have been held, in equal shares." Thus, upon the death of the person in trust for whom the share is held, the capital of such trust estate, "as it shall then exist," that is, at the time of distribution,

shall be paid over to the issue. If the testator's child survived him and died under twenty-five years of age, the direction to pay to that child a quarter of the estate upon its arriving at that age manifestly could not be complied with. At that time the capital of such trust estate as it would then exist would be all of the share of the testator's residuary estate which was held in trust for that child. It had not then been depleted by the payment which was to be made when the child arrived at the age of twenty-five years. There is no direct devise or bequest of any part of the testator's property to any of his surviving children. The sole right of a child to any part of the capital of the estate is contained in the direction to the executors to pay to a surviving child one undivided quarter of the share held in trust for that child upon his arriving at the age of twenty-five years and thirty years respectively, and it seems to have been clearly the intention of the testator that upon the death of either of his surviving children the capital of the share held in trust for him was to vest absolutely, in the absence of the exercise of a power of appointment, in the issue of the child so dying. The terms of the will negative the idea that the testator intended to vest absolutely in either of his surviving children any portion of the estate held in trust for them until they arrive at the age of twenty-five years. The devise or bequest over took effect upon the death of a surviving child, and the property thus devised or bequeathed was the capital of the share held in trust for that child at the time of his death, and to carry this intention into effect the judgment should be modified accordingly.

PATTERSON, J., concurred.

Judgment modified as directed in opinion, with costs to guardian *ad litem* payable out of the fund.

ALICE VINER, Appellant, v. THOMAS L. JAMES and Others,
Respondents.

Action against directors of a corporation to recover damages for alleged false representations — motion to make the complaint more definite and certain by alleging which of the defendants were directors at the respective times when the representations were made — bill of particulars.

The complaint in an action brought against the directors of a corporation alleged that by reason of certain statements contained in an address of the defendant James, one of the directors, and by reason of statements made in addresses of other of the directors at various times and in annual reports of the corporation, certain representations were made which were false, and that the plaintiff acting upon them bought shares of stock in the corporation; and after having bought those shares, refrained from selling them in consequence of false, fraudulent and untrue statements, upon which she relied. Relief was asked against all of the defendants.

It was not alleged that at all the times therein mentioned all the defendants were directors or were connected with or could be made responsible for false representations, if such representations were made.

Held, that the plaintiff should be required to make her complaint more definite and certain by specifically alleging which of the defendants were directors at the respective times the alleged false reports or statements upon which the plaintiff relied were put forth and the times at which the plaintiff purchased her stock;

That the defendants were not limited to a demand for a bill of particulars.

APPEAL by the plaintiff, Alice Viner, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of March, 1903, granting the defendants' motion to make the plaintiff's complaint more definite and certain, and directing the service of an amended complaint.

G. L. F. Rohan, for the appellant.

Charles A. Deshon, for the respondents.

PATTERSON, J.:

This is an appeal from an order granting a motion made by the defendants to require the plaintiff to make her complaint definite and certain. The court below held, and properly, that the remedy

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invoked by this motion was the correct one and that the defendants were not limited to a demand for a bill of particulars. (*People ex rel. Crane v. Ryder*, 12 N. Y. 433.)

The object of the present motion was to have the complaint, as the court below said, put in such shape that the defendants, all or either of them, might plead to it in such a way as might be advised for the protection of their respective rights. The action is against a number of defendants who were directors or trustees of the Anglo-American Savings and Loan Association, a corporation organized under the laws of the State of New York. It is claimed that by reason of certain statements contained in an address of the defendant James, one of the directors, and by reason of statements made in addresses of other of the directors at various times and in annual reports of the corporation, certain representations were made which were false and that the plaintiff acting upon them bought shares of the corporation named; and after having bought those shares, refrained from selling them in consequence of false, fraudulent and untrue statements, upon which she relied. The complaint is framed in such a way as to ask relief against all of the defendants.

The indefiniteness of the complaint in respect to very substantial allegations affecting the liability of the defendants is apparent. It is not shown that at all the times therein mentioned all the defendants were directors or were connected with or could be made responsible for false representations, if such representations were made. It is true, the complaint says that at the times mentioned the defendants were directors, but it is obvious from reading the pleading that it cannot be assumed that each and every one of the defendants was a director of the corporation at each and every time referred to in the complaint. We think, therefore, the court below was right in ruling that there should be a specific allegation as to which of the defendants were directors at the respective times the alleged false reports or statements upon which the plaintiff relied were put forth; and so with relation to the times at which the plaintiff purchased her stock. It may be that such purchase was made before any of the statements or representations were put forth, which the plaintiff claims to be false; and further than that, as each defendant is sought to be made liable for his own fraudulent statement or representation, he should be connected by positive allegation with the repre-

sentations, responsibility for which is sought to be charged upon him.

We think the order should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

ROSE M. LEARY, Respondent, v. LIZZIE J. CORVIN and THE CHURCH OF ST. MARY IN THE CITY OF NEW YORK, Appellants.

Fraudulent conveyance—real property purchased with money advanced by a daughter of the grantee—an oral understanding that the property should belong to the daughter—when conveyances of the property to a church corporation and by the church corporation to a third party will be set aside as fraudulent—mortgage executed by the third party.

Patrick J. Corvin purchased certain real property with moneys, a portion of which had been contributed by his daughter, who was his only child. The title was taken in Corvin's name, and it was understood that he and his wife would use the premises as their home during their life, and that, upon their death, the property was to belong absolutely to the daughter whose contribution to the purchase price represented the full value of her estate in remainder. Subsequently Corvin and his wife executed to a church corporation an absolute conveyance of the premises for a nominal consideration. The church corporation executed a deed conveying to the grantors a life interest in the premises, but the latter conveyance was not recorded. Subsequent to Mrs. Corvin's death, the church corporation conveyed the premises to Lizzie J. Hurley by a deed expressing a consideration of \$14,500, none of which was paid.

On the same day Corvin executed to her a release of his life estate in the premises. Hurley then executed a \$6,000 mortgage upon the property to secure a loan which she had procured and then reconveyed to Corvin a life interest in the premises. Five thousand dollars of the mortgage loan was paid to the church corporation and the remainder was used for the payment of expenses. Corvin married the said Lizzie J. Hurley three months later, and subsequently died.

Held, that Corvin's daughter was entitled to a judgment declaring her to be the owner of the premises in fee simple subject to the \$6,000 mortgage, and to recover the \$5,000 received by the church corporation;

That Lizzie J. Hurley should be required to account for the rents of the premises, but that she should be protected, by bond or otherwise, against liability on the mortgage executed by her.

APPEAL by the defendants, Lizzie J. Corvin and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of June, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, adjudging the plaintiff to be the absolute owner of certain premises in the city of New York.

David McClure, for the appellant Corvin.

Michael J. Scanlan, for the appellant church.

J. Aspinwall Hodge, for the respondent.

Judgment affirmed, with costs on the opinion of the court below (O'BRIEN, J., dissenting).

The following is the opinion of GREENBAUM, J., delivered at Special Term :

GREENBAUM, J. :

This action is brought to establish the title in fee absolute in the plaintiff to certain real property situate in the city of New York, subject only to an existing mortgage of \$6,000, to compel defendant Corvin to render an account of rents collected, and to recover a judgment against the defendant the Church of St. Mary for the sum of \$5,000 and interest. The facts out of which this controversy arises are set forth in detail in the opinion of Mr. Justice WERNER, before whom the case was originally tried and who dismissed the complaint upon the merits (29 Misc. Rep. 68), and in the opinions of the Appellate Division, which reversed the judgment of the Special Term (63 App. Div. 151). Upon the present trial substantially the same testimony was presented as upon the former trial, supplemented, however, by the testimony of one Martin Cody, whom the plaintiff produced as a newly-discovered witness. It would seem to be sufficient here to state that the plaintiff was the daughter of one Patrick J. Corvin and Mary Corvin; that in 1875, plaintiff, who then married a Mr. Leary, gave to her father the sum of \$1,385, which she had drawn from two savings banks in this city, where the money had been deposited in her name for upwards of one year; that the

father, with the money thus given him by his daughter and certain other moneys given to him by his wife, Mary, purchased the premises involved in this suit known as No. 279 East Broadway, with the understanding that the parents would use it as their home as long as they lived, and that upon their death the property would belong absolutely to the plaintiff, who was an only child. It appears that the plaintiff, some time after her marriage, unfortunately became addicted to the liquor habit to such a degree that it became necessary for her welfare on a number of occasions to place her in a sanitarium, although it is proper to state that it is now asserted that for a number of years past she has overcome the desire for drink. The title to the property was taken in the father's name, a fact of which the plaintiff claims that she had no knowledge at that time. In December, 1890, the father and mother conveyed the property in question to the defendant the Church of St. Mary for a nominal consideration by deed absolute, which was duly recorded. On the same day the church executed a conveyance back to the parents, giving them a life estate in the property, but which was not recorded. In February, 1892, the mother, Mary Corvin, died. On December 21, 1892, pursuant to an order of this court upon an application for leave to sell, the church conveyed the premises to one Lizzie J. Hurley (now known as Lizzie J. Corvin), one of the defendants herein, for the expressed consideration of \$14,500. On the same day the father, Patrick J. Corvin, released his life estate to said Lizzie J. Hurley, who at the same time executed a mortgage for \$6,000 upon the premises in consideration of a loan for said sum which she had procured, and reconveyed a life estate to Patrick J. Corvin. From the proceeds of the mortgage loan the sum of \$5,000 was paid to the defendant, the church, and the balance of \$1,000 was used for the expenses involved in the various transfers and transactions just detailed. On February 9, 1893, Patrick J. Corvin married said Lizzie J. Hurley. On March 31, 1898, he died, and on August 26, 1898, this action was commenced. The complaint is predicated upon the theory that not only was the property impressed with a trust of an estate in remainder at the time of its purchase in favor of the plaintiff, but that the conveyance to the church was made upon the same trust. The plaintiff has submitted the testimony of various witnesses in support of her claim that the property

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was originally purchased partly with her money, upon the understanding that she was to own the remainder after the termination of the life estates of her parents, and no proof in contradiction of such testimony has been presented, and this testimony is entitled to credit, unless the cross-examination of the witnesses, their relation to the parties, the circumstances and probabilities of the case tend to impair its probative force. The defendants have submitted testimony of living witnesses as to the circumstances attending the conveyance to the church, showing that it was not made upon any trust, and this testimony, being uncontradicted by any direct proof, should only be discredited for reasons similar to those indicated with respect to plaintiff's proof. Under the view that I take of the case, I have concluded to assume that the testimony given by the defendants' witnesses, so far as it affects the issue relating to the trust character of the conveyance to the church, is truthful and I shall consider the case solely with reference to plaintiff's claim that the property was impressed with a trust at the time of its purchase by plaintiff's father. It is undisputed that the plaintiff had the legal title to the moneys on deposit in the savings banks, and it would be mere speculation to indulge the thought that this money belonged to the father, or if it had originally belonged to him, that she held the money in trust for him. On the contrary, the circumstances favor the finding of an absolute ownership of this money in the plaintiff, who had lived with her parents until her twenty-fourth year, rendered services in the household and assisted in serving and waiting upon boarders and lodgers, kept by her mother. But even if the money was a gift from her parents, plaintiff's title thereto, so far as the proofs show, cannot well be questioned. Added to the testimony produced upon the previous trial is that of the witness Cody, who confirms that of the other witnesses as to the purchase of the real estate in question, in part, with plaintiff's money, and upon the understanding that the title thereto was to vest in plaintiff upon her parents' death. I do not think that plaintiff's witnesses have been discredited. The circumstances attending the purchase, the fact that plaintiff was the sole child and that complete confidence seems to have prevailed between parents and daughter, all these considerations tend to strengthen the belief that it was probable and natural for the parents, at the age at which the plain-

tiff had then attained, to have had the understanding with their daughter, to which these witnesses testify. It also appears, upon an application of the Northampton tables, that the sum contributed by the plaintiff was about equal to the value of the estate in remainder, subject to the life estates of the parents. Although this fact is doubtless a pure coincidence, it is nevertheless evidence that the plaintiff gave a valuable consideration for her prospective remainder interest. The ordinary method of conveying to the church a fee in remainder would have been by deed conveying the title subject to the enjoyment in possession on the part of the grantors during their lives, or by a conveyance of an absolute deed and a simultaneous reconveyance of a life estate to the grantors, as here done, coupled, however, with a simultaneous record of both instruments, which was not done in this case. A departure from the ordinary procedure casts suspicion upon the transaction, because of the secrecy implied with reference to the understanding as to the reservations intended. Such a secret arrangement is consistent with the idea that the parents, knowing the daughter was entitled to the property after their death, deliberately entered into a plan which should keep from her, in her lifetime, knowledge of the real disposition they had made of the property, and, for aught one knows, after having given her to understand that the church was holding the property in trust for all of them, for some such reason as the proofs indicate, as that the father might remarry after his wife's death. That the defendant Lizzie J. Corvin is not an innocent purchaser for value is evident from the facts attending her acquisition of the title. The petition made to this court for leave to sell these premises, and in which plaintiff's father united, contained the false allegation that "it is proposed to sell the said property to Lizzie J. Hurley for fourteen thousand five hundred dollars, which is the best price that can be obtained for the same, and to apply the proceeds of such sale in payment, so far as may be necessary, of the indebtedness of the corporation and the cash value of the life tenant's estate." As matter of fact the "cash value of the life tenant's estate," as calculated by the Northampton tables, was less than \$5,000, leaving the amount to which the church was entitled as upwards of \$9,000, and yet the amount actually paid to the church was but \$5,000. The defendant Lizzie J. Corvin paid no money of her own for the conveyance, but, from the mortgage

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loan of \$6,000 obtained when title was taken, the sum of \$5,000 was paid to the church and the remaining \$1,000 went to pay all the expenses incurred in the proceedings for leave to sell and in procuring the loan. The unusual circumstance of the payment of \$1,000 for all the expenses by a purchaser, taken in connection with the marriage of the defendant Lizzie J. Corvin, the purchaser, to Patrick J. Corvin, plaintiff's father, within a few months after the conveyance, clearly shows that she was used merely as a dummy; that she was not a *bona fide* purchaser and that she was not a purchaser "for value." Having found the facts it is in order to determine the law applicable to them. The expressions of the Appellate Division on the appeal heretofore taken in this case, and the principles announced in *Goldsmith v. Goldsmith* (145 N. Y. 313, 318) seem to be controlling here. The general rule stated in the latter case, following that declared in *Wood v. Rabe* (96 N. Y. 425, 426), was "that when a person, through the influence of a confidential relation, acquires title to property or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief. It was added that, while the fraud must be something more than the mere breach of a verbal agreement, yet where the transaction is one between parent and child, and involves the greatest confidence on one side and the greatest influence on the other, the case is one in which equity may properly intervene." The facts here presented seem peculiarly to require the intervention of a court of equity to enforce the understanding or agreement between the plaintiff and her parents when the property was purchased. No rights of innocent third parties are affected by decreeing that the fee of the property involved be declared to vest in the plaintiff. The defendant church concededly paid no consideration for the conveyance to it while the defendant Lizzie J. Corvin is not a *bona fide* purchaser, in view of the circumstances attending her acquisition of the title to the premises, nor a purchaser for value, and if suitable provision be made to relieve her from any possible liability under the bond which she gave upon the execution of the existing mortgage, no injury can come to her by setting aside the conveyance to her. I, therefore, decide that the plaintiff be decreed to be the absolute owner of the property described in the complaint, subject to the

mortgage of \$6,000; that in view of the admission upon record as to the net rental for the year ending March 29, 1899, being \$700, and of the waiver of plaintiff to any further account made upon the argument, the defendant Lizzie J. Corvin pay over to the plaintiff \$700, with interest from April 1, 1899, in lieu of an accounting for rents collected; that the defendant Lizzie J. Corvin be relieved from the obligations of her bond secured by the \$6,000 mortgage by sufficient indemnity or otherwise; that the plaintiff have judgment against the defendant the Church of St. Mary for the sum of \$5,000, with interest from August 20, 1898, and that the plaintiff is entitled to the net proceeds of the rents collected by the receiver heretofore appointed herein. No costs.

Cases

DETERMINED IN THE

FOURTH DEPARTMENT

IN THE

APPELLATE DIVISION,

March, 1904.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY and
OSWEGO AND SYRACUSE RAILROAD COMPANY, Appellants, v. THE
CITY OF OSWEGO, Respondent.

Railroad—right to occupy a city street acquired under a resolution of the common council—a failure to occupy the whole length of the street is an abandonment—passage of a subsequent resolution authorizing the use of the portion not occupied—a provision in the subsequent resolution authorizing the common council to revoke it at its pleasure is reasonable—the ownership of the fee of the street is immaterial.

Prior to 1850 the Oswego and Syracuse Railroad Company constructed a railroad between the cities of Oswego and Syracuse. The charter of the city of Oswego and the general statutes relating to railroads prohibited the railroad company from laying its tracks upon the streets of the city without its consent. In 1854 the common council of the city of Oswego passed a resolution authorizing the railroad company to lay its tracks upon Water street, including that portion thereof north of Bridge street. In 1855 the railroad company constructed its tracks upon Water street south of Bridge street, but did not attempt to lay tracks on that portion of the street lying north of Bridge street nor did the city request it to do so.

In 1863 the railroad company applied to the common council for permission to extend its tracks on Water street north of Bridge street and also to occupy certain other streets. The common council granted the application upon certain conditions which were so onerous that the railroad company did not avail itself of the permission.

In 1870 the railroad company again applied for permission to extend its tracks on Water street north of Bridge street. The common council passed a resolution granting the desired permission upon condition that the railroad company would pave and grade the street and keep it in good order and condition. The

resolution further provided: "This permission to remain in force and effect during the pleasure of the Common Council."

Immediately after the passage of this resolution the railroad company laid tracks on Water street north of Bridge street and continued to operate the same until 1901, when the common council assumed to rescind the permission given by the resolution of 1870, and directed the railroad company to remove the tracks laid pursuant thereto.

Held, that the railroad company had, prior to 1870, abandoned the right which it had acquired under the resolution of 1854 to lay its tracks upon Water street north of Bridge street, and that its right to continue to maintain the tracks upon that portion of Water street was governed entirely by the resolution of 1870;

That the statutory provisions, requiring the consent of the city to the use of its streets for railroad purposes, empowered the city to impose upon the railroad company in consideration of such consent any and all reasonable conditions;

That the railroad company having accepted the resolution of 1870 without objection, the rights which it acquired thereunder were burdened by all the conditions specified therein;

That the provision in the resolution, "this permission to remain in force and effect during the pleasure of the Common Council," was reasonable, and that it was lawful for the common council, under such provision, to rescind the resolution of 1870 and annul the rights which the railroad company acquired thereunder, notwithstanding the fact that the railroad company had duly performed all the obligations which the resolution imposed upon it respecting the care of Water street;

That it was not important whether the fee of Water street was in the State of New York or in the city of Oswego or in the abutting owners, as, in any event, the city of Oswego had control and jurisdiction over it.

APPEAL by the plaintiffs, the Delaware, Lackawanna and Western Railroad Company and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Oswego on the 7th day of October, 1903, upon the report of a referee, dismissing the complaint upon the merits.

The action was commenced on the 4th day of June, 1902, to perpetually restrain the defendant from removing that portion of plaintiffs' railroad constructed and being operated in Water street in said city, from the southerly line of Bridge street to Seneca street, it being conceded that the defendant intended to remove the tracks of such railroad from that part of Water street and would have done so except for an order of the court granted herein which restrained the defendant from taking such action until after the rendition of final judgment.

William S. Jenney, for the appellants.

Elisha B. Powell, Merrick Stowell and Louis C. Rowe, for the respondent.

McLENNAN, P. J. :

The plaintiffs claim the right to occupy the portion of the street in question by virtue of certain statutes, under and by virtue of which the Oswego and Syracuse Railroad Company was incorporated and was accorded certain rights ; also under the General Railroad Law of the State passed in the year 1850 and under and by virtue of certain resolutions of the common council of the defendant authorizing the occupation of such street. The defendant claims that notwithstanding such statutes and resolutions, to which attention will be called, it had the right at any time, at its option, to compel the discontinuance of the use by the plaintiffs of the portion of Water street in question.

The Oswego and Syracuse Railroad Company was incorporated by chapter 270 of the Laws of 1839, and was authorized to construct and maintain a railroad between the villages of Oswego and Syracuse by the most direct and eligible route. Section 2 provides : " If the said corporation * * * shall not, within four years from the passage of this act, finish the said road and put the same in operation, then the said corporation shall thenceforth forever cease, and this act shall be null and void."

Section 8 is as follows : " § 8. The Legislature may at any time alter or repeal this act."

By various other acts said plaintiff was given additional privileges, certain restrictions were removed, and the time for the construction of the railroad was extended, but the power to repeal was at no time surrendered or modified by such statutes. (Laws of 1841, chap. 17 ; Laws of 1845, chap. 320 ; Laws of 1847, chap. 270.)

Prior to 1850 said plaintiff had completed its railroad between Oswego and Syracuse, so far as appears, upon the route originally designated by it, but it did not construct any part of said railroad upon Water street. In fact, that is no part of its main line, but is a branch extending from the main line northerly, parallel with the river, to the harbor.

By subdivision 5 of section 28 of chapter 140 of the Laws of 1850,

which was the General Railroad Law, it was provided: "Nothing in this act contained shall be construed to authorize * * * the construction of any railroad not already located in, upon or across any streets in any city, without the assent of the corporation of such city."

The city of Oswego was incorporated by chapter 116 of the Laws of 1848. Section 14 of title 3 of the act provides: "§ 14. The common council shall have power, whenever in its opinion public convenience requires it, to determine and designate the route and grade of any railroad within the city, to sanction and permit the track of any railroad to be laid in or along any street or public ground, and to regulate the use of locomotive engines and of steam or any other motive power, or cars, on any or every portion of any railroad within the city, and to prescribe and regulate the speed of cars upon any and every part of any such railroad, and to enact ordinances in pursuance of the powers hereby granted, imposing a penalty of not more than one hundred and fifty dollars upon the proprietors or corporations owning any such railroad, or their servants, for each and every violation of any such ordinance." The same provision is incorporated in the amended charter of 1860, being section 14 of title 3 of chapter 463 of the Laws of that year.

So that, by the charter of the defendant, as well as under the General Railroad Law of 1850, it was essential for the Oswego and Syracuse Railroad Company, in order to entitle it to lay its tracks in and upon Water street, to obtain the consent of the city.

In 1854 said plaintiff applied to the common council of the defendant for permission to construct, maintain and operate its track upon certain parts of Water street, including the portion in question. Thereupon the common council duly adopted the following resolution:

"*Resolved*, That the Oswego and Syracuse Railroad Company be and hereby are permitted to lay a track of their road on a line and grades delineated on a map and profile of new location made by Robt. E. Ricker, and on file with the County Clerk, commencing west of 6th street in the 3rd ward of the city of Oswego, thence extending easterly to First street, and by a curved line northerly to the intersection of Water and Oneida streets; thence through and along Water street to the harbor, with a branch track from Schuyler

street through Front street to the harbor, on such grade as is laid down on said map and profile — and said company may make the said grade, and they shall grade all the streets intersected.”

In 1855, the following year, the Oswego and Syracuse Railroad Company constructed its railroad upon that part of the route described in the resolution, south of the southerly line of Bridge street, but made no attempt to occupy any portion of Water street north of the southerly line of Bridge street. Instead, the said plaintiff constructed a wharf immediately south of Bridge street, and the lake craft having freight to deliver or receive from the said plaintiff were accommodated at that point in the river, instead of at the outer harbor, as was intended when the consent referred to was given. This situation continued unchanged until the year 1870. During all those years the said plaintiff made no attempt to avail itself of the privileges granted to it by the resolution of 1854, so far as it related to that part of Water street north of the southerly line of Bridge street. It should be said, however, that, so far as appears, the defendant made no request that the said plaintiff's tracks be extended to the harbor, and took no affirmative action to indicate that it was not satisfied with the situation as it existed.

In the year 1863 the Oswego and Syracuse Railroad Company made application to the common council for permission to lay its tracks across Bridge street, and to extend the same down Water street as far as Market street, which was included in the resolution of 1854. In said application the railroad company asked for permission to occupy certain other streets not referred to in the resolution of 1854, and to make many changes in connection therewith. The common council, by resolution duly adopted, granted said application upon certain conditions, many of them apparently onerous. So far as appears the Oswego and Syracuse Railroad Company never accepted such consent, or did any act thereunder.

After the passage of the resolution of 1863 everything remained as before until April, 1870, when the plaintiff the Oswego and Syracuse Railroad Company again petitioned the common council of the defendant for permission to extend its tracks along Water street, from the southerly line of Bridge street to the harbor, and also through Front street from its intersection with Water street to the harbor. In the petition the resolutions of 1854 and 1863 are

referred to, and it is then stated: "And the petitioner further shows that the said R. R. Co. has availed itself of only a part of the privileges so given (by such resolutions); that now the commercial necessities of the city and port of Oswego require the extension of the R. R. track through Water street to the harbor * * * and your petitioner * * * prays * * * the renewal, if necessary, of the privilege of laying such tracks. * * *"

On the 10th day of April, 1870, the prayer of the petitioner was granted by the common council of the defendant, by the adoption of the following resolution:

"WHEREAS, by a resolution of the Common Council of the city of Oswego, adopted on the 20th day of October, 1854, permission was given to the Oswego and Syracuse Railroad Company, among other things, to lay a track from Oneida street, 'through and along Water street to the harbor, with a branch from Schuyler street, through Front street to the harbor,' under which permission said railroad company have laid their tracks on Water street from Oneida street to the south line of Bridge street.

"And WHEREAS, said railroad company now make application for leave to continue their road across Bridge street through and along Water street and Front street to the outer harbor, upon the grade as laid down on a map and profile here presented to the Common Council.

"Resolved, that the prayer of said petitioner be granted upon the following terms and considerations, namely: That said railroad company shall plank between the rails of such tracks, and lay one tier of plank outside the rails on either side; shall grade Water and Front streets outside the rails, including the sidewalks, to correspond with the increased elevation given to any portion of said streets in laying the said tracks; shall pave said Water and Front streets through the whole length thereof; shall keep the snow from said streets so as to make them reasonably passable for the public at all times; shall leave the roadways in, through and over or across which said tracks shall pass, in good order and condition for public use and travel; shall place the rails of said track level with the pavement or roadway; shall keep said pavement and planking in good repair; shall replace all pavement injured or broken up in the laying of said track or tracks, and keep the approach to the bridge

on Bridge street in good order and condition. All of which is to be done under the direction and approval of the Common Council, or of the street commissioner of said city. And in case said railroad tracks or any part thereof is abandoned or changed, the said railroad company shall fill all excavations made in said streets by the laying of the tracks therein, and restore them and the intersecting streets to their present grade and condition, if required by the Common Council so to do. And said railroad company shall in good faith obey all ordinances, directions and resolutions of the said Common Council of said city in the premises. This permission to remain in force and effect during the pleasure of the Common Council, and is subject to such modifications, changes and alterations as said council may, at any time or times, impose or direct."

Immediately thereafter the Oswego and Syracuse Railroad Company laid its tracks in Water street, from the southerly line of Bridge street, and ever since that time it, or its lessee, the Delaware, Lackawanna and Western Railroad Company, has been engaged in operating the same in connection with its tracks laid in Water street south of Bridge street, under the resolution of 1854.

By resolution of its common council passed December 23, 1901, the defendant assumed to rescind the permission given to the plaintiffs by the resolution of 1870, to construct, maintain and operate its railroad in Water street, between the southerly line of Bridge street and Seneca street, and directed the plaintiffs to remove their tracks therefrom within four months, and further directed that in case the plaintiffs failed so to do, the department of works be empowered to remove the same. The plaintiffs, having neglected to comply with the direction, the common council, by resolution passed June 3, 1902, directed the department of works of the defendant to at once remove the tracks of plaintiffs' railroad from Water street, from the southerly line of Bridge street to the north line of Seneca street. To prevent the carrying out of such purpose on the part of the defendant this action is brought.

The first question presented by this appeal is whether or not the plaintiff, the Oswego and Syracuse Railroad Company, prior to 1870, had abandoned all rights acquired under the resolution of 1854 in the portion of Water street in question. Concededly, for

more than fifteen years it made no attempt to avail itself of the consent given. In 1863, although still apparently desiring to reach the harbor by laying its tracks in that part of the street, no attempt was made to do so under the 1854 resolution. Apparently the company wanted additional rights, as appears by its application of that date, which were granted, but were so burdened with conditions that the resolution was not accepted and nothing was done under it. There was then another wait of seven years, during which time nothing was done in the premises. In 1870 the plaintiff again sought permission from the common council to occupy that portion of Water street, presumably because it was considered necessary, and the resolution of 1854 was regarded as insufficient. When the resolution of 1870 was passed said plaintiff immediately laid the tracks in question, and has ever since operated the same.

Upon these facts, taken in connection with the recitals in the said plaintiff's application, we think it should be held that it abandoned all the rights which it had acquired under the resolution of 1854.

Wood, in his work on Railroads (2d ed. p. 890), says: "The question as to whether there has been an abandonment or not is usually one of fact to be determined by the circumstances of each case, and a mere non-user for a long period, less than the period prescribed in the Statute of Limitations, as in one case thirteen years, is not sufficient to establish an abandonment."

In the case at bar, as we have seen, there was not only nonuser for more than fifteen years, but during that time the said plaintiff, in at least two instances, sought to acquire the same rights that were granted to it by the resolution of 1854, which resolution it now claims at all times entitled it to occupy the part of Water street in question. During all the time from 1870 to 1901 did the defendant have the right to believe that the said plaintiff was occupying the street pursuant to the 1870 resolution, or should it have understood that such occupancy was under and by the virtue of the 1854 resolution?

We think the evidence clearly establishes that the portion of the railroad in question was constructed under the resolution of 1870, and that upon its acceptance all the rights which the plaintiffs acquired under the resolution of 1854, in respect to that part of

Water street, ceased and terminated, and that thereafter the only consent available to the plaintiffs was that contained in the resolution of 1870.

The next and perhaps more serious question is whether or not the defendant, at its pleasure, had the right to rescind the resolution of 1870, and annul the rights which the plaintiffs acquired thereunder. Such is the defendant's right, according to the express language of the resolution, namely: "This permission to remain in force and effect during the pleasure of the Common Council * * *." It is insisted by the learned counsel for the appellants that under the defendant's charter and other statutes, it was only authorized to consent or refuse to consent to the construction of plaintiffs' railroad upon the street in question, and to impose reasonable conditions as to the manner of constructing and operating the same; in effect, that the right of the plaintiffs to occupy the street was conferred by the Legislature, subject only to the consent of the municipality, and that when such consent was once given it became, as to the municipality, irrevocable, notwithstanding the right of revocation was expressly reserved.

It is urged that the decision of this court in *Delaware, Lackawanna & Western R. R. Co. v. City of Buffalo* (4 App. Div. 562; affd., 158 N. Y. 266) fully sustains the proposition. It should, therefore, be carefully considered. In that case the plaintiff filed a map and profile of its proposed route through the city of Buffalo, in the office of the clerk of Erie county, which showed, among other things, that such route was designed to cross Main street, one of the thoroughfares of that city. Thereafter the city, by resolution of its common council, duly granted permission to the railroad company to construct its road along the proposed route, but directed the crossing of Main street to "be by bridge, leaving a clear roadway underneath at least twelve (12) feet in height and twenty-eight (28) feet in the clear * * * and subject to the approval of the city engineer." The railroad company, availing itself of the permission thus granted, proceeded at once to construct its crossing, but without consulting with or receiving the approval of the city engineer, and in doing so located both abutments of the bridge in the street; whereupon it was notified by the city engineer that the plan of crossing did not meet his approval.

Soon thereafter the common council, by resolution, directed the company to construct a span of at least sixty-six feet in width in carrying the bridge over the street. Notwithstanding such resolution, and after a conference with the city engineer and the defendant's street committee, the plaintiff proceeded with and completed the construction of its bridge in such manner that a clear roadway was left underneath the structure twelve feet in height and forty-two and one-half feet in the clear, locating, however, both abutments entirely within the limits of the street. The evidence showed that such construction rendered the use of the street dangerous and unnecessarily interfered with its use as a highway; that it was entirely feasible to carry the plaintiff's tracks over the highway by means of a single span. The common council of the city did not formally approve of the action of the city engineer and the street committee, and finally adopted a resolution directing the street commissioner to remove the abutments from said street. To restrain the city of Buffalo from so doing that action was brought. It was decided by this court that the right of a railroad company to cross the streets of a city is derived from the Legislature, and that it has supreme power over the streets of cities, as well as over the highways of the State at large, although the assent of a municipality must be first obtained, as a prerequisite to the exercise of that right. It was also held that the approval of a municipality when so given is irrevocable. It was further held that the State, by the General Railroad Law, had authorized the plaintiff to cross Main street with its railroad, and that the power so to do was lodged in the State exclusively. In effect, that there was no power in the municipality to grant such right, but that the consent of the city was also a prerequisite to the exercise of such right, and thereby it was clothed with the power of determining the manner of such crossing, provided it did not authorize a construction which would unnecessarily interfere with the usefulness of the thoroughfare.

There is nothing in the decision of the case referred to which can be construed as holding that a railroad company, under the power conferred by the Legislature of the State, may cross a street or highway where it pleases, or that a municipality is bound to consent to any proposed crossing, and we think such is not the law, but that, upon the other hand, the right conferred by the Legislature upon

the municipality to consent involves the right to impose any and all reasonable conditions upon the railroad company, in consideration of such consent. In the case referred to (*supra*), it was held that the bridge as constructed by the plaintiff unnecessarily obstructed the street, and that the city had the right to cause the removal of such obstruction.

In the case at bar we may assume that the plaintiff, the Oswego and Syracuse Railroad Company, had a right to construct, maintain and operate a railroad upon Water street, by virtue of the General Railroad Law of the State, provided it first obtained the consent of the defendant. When application was made for such consent by the said plaintiff in 1870, as a condition of granting the same the defendant imposed certain conditions, among them, as we have seen, that such consent might be revoked at its pleasure. The said plaintiff said, in effect, we are satisfied with the consent, burdened with all the conditions specified in the resolution. It accepted the same and thereupon immediately constructed the railroad in question.

No case has been called to our attention which holds that where the right of revocation is expressly reserved in a resolution giving the consent of a municipality to a railroad company to construct its railroad in the streets of a city such company, after having accepted the same and acted thereunder, may insist that such reservation to revoke was unauthorized and of no force and effect, and that notwithstanding such reservation it had the right for all time, or at least during its corporate existence, to maintain and operate its railroad in such street.

In this case the referee said in his opinion, which is made a part of the record: "Some question is made that the railroad company failed to comply with the provisions of the resolution of 1870 in relation to keeping Water street in repair, but the evidence is clear that the company substantially complied with the terms of the resolution, and the officers of the city of Oswego having charge of its streets testified that whenever a request was made to fix said street the same was complied with by the railroad company, and there are no grounds which would authorize the court to render judgment for the defendant upon the claim that the railroad com-

pany has failed to comply with any of the conditions contained in the resolution of 1870."

We think the evidence fully justifies the conclusion thus expressed by the referee. We must, therefore, determine whether or not it is within the power of a municipality to revoke a consent given by it to a railroad company to construct and maintain its railroad upon the streets of such municipality solely upon the ground and because such consent reserved the right to the municipality to revoke the same at its pleasure when all the conditions imposed, perhaps involving great expense, have been complied with and performed by the railroad company. The question is important, and we have been unable to find any decision in the courts of this State which is decisive of the proposition. Dillon on Municipal Corporations (4th ed. § 706) states the rule to be: "Where, under the general statutes of a State, a railroad company was forbidden to construct and operate its road upon the streets of an incorporated city 'without the assent of the corporate authorities,' these are not limited to a simple granting or denial of the right of way, but may prescribe conditions on which they will give their assent, and if these are accepted by the railroad company, they are binding upon the parties."

Unquestionably the city of Oswego had the right to say no, in answer to the application of the Oswego and Syracuse Railroad Company made in 1870, and to have stopped there; but instead of denying the application, the defendant said to the Oswego and Syracuse Railroad Company, in effect, you may construct this branch of your railroad upon the street in question, but only upon certain conditions, one of which is that when the public interest demand it you shall discontinue its use and remove your tracks therefrom. The said plaintiff accepted such condition, as it did all others specified in the resolution, and constructed its railroad. Requiring a railroad company, as a condition of obtaining the consent of a municipality to construct and maintain a railroad in and upon a certain street, to pave such street, change its grade or build a depot at a specified place, is no different, upon principle, from requiring such company to discontinue the use of such street for railroad purposes after the lapse of a certain time, or at the pleasure of the municipality. The last condition mentioned might be more reasonable than either of the others. Suppose a railroad company should make application to

the authorities of a city for permission to construct and operate a steam railroad upon a street in the extreme suburbs, not built upon and but little used by the public. Might it not be a very reasonable and proper condition to impose that when such street should become lined upon either side with business places or residences the tracks of the railroad should be removed? In many cases which might be suggested a particular street might be occupied temporarily by a railroad company, to the advantage of the company and of the people of the municipality as well; whereas such occupation, at the expiration of a term of years, would be a menace to the lives and property of the inhabitants. We can discover no good reason why a consent given under the conditions first mentioned, and which expressly reserves the right to revoke the same, may not properly be revoked when the other conditions arise. May not a city say to a railroad corporation which applies to it for permission to construct a railroad upon a certain street, you may construct and operate your railroad thereon for a certain specified time and no longer? If it accepts the consent given with such condition imposed, we know of no reason why such railroad company ought not to be compelled to comply with the terms of its engagement or contract, to wit, that it would cease to use such street for its purposes at the expiration of the time mentioned.

We think it is not important whether the fee of the street in question was in the State of New York, in the city of Oswego, or in the owners of the property abutting upon such street. In any event it was dedicated to the public, and the city of Oswego was given control and jurisdiction over it, the same as all other streets in said city, and the defendant had the right to determine, having regard to the rights of the public, how such street should be used.

These considerations lead to the conclusion that the judgment appealed from should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

WILLIAM DE GRAFF, as Trustee in Bankruptcy for FANNIE MENG,
an Adjudged Bankrupt, Plaintiff, v. ROSA C. LANG, Defendant.

Action by a trustee in bankruptcy against a judgment creditor of the bankrupt — an adjudication in the bankruptcy proceeding that the bankrupt was insolvent when the judgment was obtained against him, is conclusive against the judgment creditor — refusal to allow a plaintiff, who has rested, to reopen his case — when improper.

Where, within four months after the recovery of a number of judgments, creditors of the judgment debtor institute involuntary bankruptcy proceedings under the Federal Bankruptcy Act, against the judgment debtor, an adjudication made in the bankruptcy proceeding that the judgment debtor was insolvent at the time the judgments were recovered, is conclusive against one of the judgment creditors in an action brought against her by the trustee in bankruptcy to recover moneys which she received under an execution issued upon her judgment, notwithstanding that none of the judgment creditors were parties to the bankruptcy proceeding.

Where the trustee in bankruptcy rests his case, after putting in evidence the decree in bankruptcy, and the trial court decides that such decree does not, as against the judgment creditor, furnish evidence of the judgment debtor's insolvency at the time the judgments were recovered, the refusal to permit the trustee in bankruptcy to reopen the case, in order to introduce common-law proof of the insolvency of the judgment debtor at the time of the recovery of the judgments, constitutes an improper exercise of the discretion vested in the court.

MOTION by the plaintiff, William De Graff, as trustee in bankruptcy for Fannie Meng, an adjudged bankrupt, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance, upon the dismissal of the complaint by direction of the court after a trial at the Monroe Trial Term.

The action was commenced on the 1st day of February, 1902, by the plaintiff as trustee in bankruptcy for one Fannie Meng, an adjudged bankrupt, to recover from the defendant, a judgment creditor of Fannie Meng, the sum of \$845.67, received by her from the sheriff of Monroe county, being a part of the proceeds of the sale by said sheriff of the property of Fannie Meng under and by virtue of executions issued upon defendant's judgment and others, which were recovered within four months of the time of the filing by other creditors of Fannie Meng of an involuntary petition in

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bankruptcy against her; upon which petition such proceedings were had as resulted in the adjudication in the United States District Court that said Fannie Meng was a bankrupt, the entry of judgment to that effect, and the appointment of the plaintiff as trustee, based upon such decree.

Harry Otis Poole, for the plaintiff.

H. B. Hallock, for the defendant.

McLENNAN, P. J.:

Fannie Meng was the owner of and engaged in running a hat and fur store in the city of Rochester, N. Y. On the 26th day of December, 1899, four judgments were recovered against her by her three sisters-in-law respectively, aggregating about \$2,615.50. One of said sisters-in-law is the defendant in this action and her judgment amounted to the sum of \$845.67. Executions were immediately issued upon all of said judgments to the sheriff of Monroe county, and on the 2d day of January, 1900, all of the property of Fannie Meng was sold thereunder for the sum of \$2,068. Out of the proceeds of such sale the defendant's judgment was paid in full, as were two of the others, and the balance of the proceeds of such sale, being \$4.42, was applied upon the other or fourth execution.

On the 6th day of March, 1900, and within four months of the time when such judgments were recovered, an involuntary petition in bankruptcy was filed against Fannie Meng by certain other of her creditors, alleging that she was insolvent and unable to pay her debts at the time the judgments aforesaid were recovered and asking that she be adjudged a bankrupt. In answer to such petition Fannie Meng denied her insolvency at the time when such judgments were recovered. Neither the defendant nor any of the judgment creditors above referred to were made parties to such proceeding.

The issue thus raised by the answer of Fannie Meng was tried in the United States District Court before the court and a jury. The jury found that Fannie Meng was insolvent at the time such judgments were recovered, and thereupon and on the 17th day of May, 1901, a decree was duly made and entered in said court adjudging that Fannie Meng was insolvent at the time of the recovery of such judg-

ments and declaring her a bankrupt. Thereafter, and on the 3d day of June, 1901, the plaintiff was duly appointed trustee in bankruptcy of the estate of Fannie Meng; he duly qualified and entered upon the discharge of his duties as such. Thereupon the plaintiff brought this action to recover from the defendant the amount which was paid to her upon the judgment which she recovered against Fannie Meng, alleging and claiming that said judgment and all proceedings had thereunder were void because recovered and had when Fannie Meng was insolvent and within-four months prior to the filing of the petition in bankruptcy against her. The defendant denied the insolvency of Fannie Meng, and alleged that her judgment was obtained in the ordinary course and in good faith, to recover a valid debt owing to her by Fannie Meng.

After making *prima facie* proof of the other necessary facts, the plaintiff, for the purpose of establishing the insolvency of Fannie Meng, at the time the defendant and the other judgment creditors referred to recovered their judgments, introduced in evidence the decree of the United States District Court which adjudged that Fannie Meng was insolvent at such time, and rested. The learned trial court held and decided that such decree was no evidence of the insolvency of Fannie Meng as against the defendant in this action. The plaintiff then offered to make common-law proof of such insolvency, but the court held that having rested his case he ought not to be permitted to reopen for that purpose, and denied his application for leave to make such proof. Thereupon the learned trial court granted the defendant's motion for a nonsuit, and directed that the exceptions be heard in this court in the first instance.

In case Fannie Meng was insolvent within four months prior to the filing of the petition in bankruptcy against her, and the judgment of the defendant was recovered against her within that time, it must be conceded that such judgment and all proceedings taken thereunder were void, because unquestionably the effect of the recovery of such judgment, the issuing of the execution thereon and the sale of Fannie Meng's property thereunder, was to give a preference to the defendant, which is prohibited by the Bankruptcy Law. Subdivision f of section 67 of said statute (30 U. S. Stat. at Large, 565) is as follows: "All levies, judgments, attachments

or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt."

We think it should be held that the decree of the United States District Court put in evidence conclusively establishes, for the purposes of this action, that Fannie Meng was insolvent at the time the defendant recovered judgment against her, and sold her property by virtue of the execution issued upon such judgment. Any other holding would lead to endless confusion in the administration of the law, and would in many cases nullify one of the principal purposes of the Bankruptcy Act. If the question of Fannie Meng's insolvency can be retried in this case, notwithstanding the decree of the United States District Court adjudging such insolvency, it may be controverted and litigated in any case brought by a trustee in bankruptcy, to secure the estate of a bankrupt against a person who may have obtained such estate by process issued out of the State courts, where such person was not made a party to the bankruptcy proceedings. In the case at bar the entire property of Fannie Meng was devoted to the payment of four judgments obtained by her three sisters-in-law, one of whom is the defendant, within four months of the time when other of her creditors filed a petition in bankruptcy, in which it was alleged, in substance, that she was a bankrupt at the time such judgments were obtained, and basing such allegation upon the fact of the recovery of such judgments, and upon that and other sufficient proof, as we must assume, such insolvency was established, and the decree of a court of competent jurisdiction was made in accordance with such allegation and proof.

We think the decree of the United States District Court, for the purposes of this action, should be regarded as conclusively establishing that Fannie Meng was insolvent at the time when the defendant recovered her judgment, and that the validity of such decree cannot be questioned in this action.

In *Carter v. Hobbs* (1 Am. Bank. Rep. 215) the head note is as follows: "An adjudication in bankruptcy being an adjudication *in*

rem, all persons interested in the *res* are regarded as parties to the bankruptcy proceedings. Among such parties are not only the bankrupt and the trustee, but all creditors, including lienors." (See, also, *Chapman v. Brewer*, 114 U. S. 169; *Rhoades v. Selin*, 4 Wash. C. C. 716.)

In *Levor v. Seiter* (34 Misc. Rep. 382) it was held that an adjudication which adjudges bankruptcy is sufficient proof of the fact of insolvency, within the language and intent of the act.

In *Matter of Ulfelder Clothing Co.* (3 Am. Bank. Rep. 425) the head note is as follows: "So, it seems, in proceeding against the bankrupt, any creditor who had a right to appear and join in the petition or to be heard in opposition thereto under section 59,* even though not entitled to notice, and though he does not appear, is in contemplation of law represented by the bankrupt, and concluded as to all matters directly in issue, and determined by the decree. At all events, the decree is conclusive upon the bankrupt and a creditor who is a direct party to the proceeding."

In *Chapman v. Brewer* (*supra*) it was said: "The District Court which made the adjudication having had jurisdiction of the subject-matter, and the bankrupt having voluntarily appeared, and the adjudication having been correct in form, it is conclusive of the fact decreed, and cannot be attacked collaterally in a suit brought by the assignee against a person claiming an adverse interest in property of the bankrupt."

In *Matter of Breslauer* (10 Am. Bank. Rep. 33) the head note is as follows: "The filing of a petition in bankruptcy is a *caveat* to all the world, and in effect an attachment and injunction."

The many cases cited in the opinion in that case we think fully sustain the proposition.

The cases referred to would seem to establish that the decree of the United States District Court, put in evidence in this case by the plaintiff, was sufficient to prove the insolvency of Fannie Meng at the time when the judgment of the defendant was obtained, and this was really the only issue involved. There is no suggestion in the evidence that the adjudication in bankruptcy was obtained by collusion with the bankrupt. In fact, as we have seen, she appeared

*See 30 U. S. Stat. at Large, 561.—[REP.]

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in that proceeding and vigorously contested that issue. We are, therefore, constrained to hold that the decree of the United States District Court put in evidence furnished conclusive evidence that at the time the judgment of the defendant was obtained Fannie Meng, the judgment debtor, was insolvent, and that, therefore, under the Bankruptcy Act, such judgment was absolutely void, and that the plaintiff had a right to recover the amount which the defendant received in satisfaction of such judgment, it having been paid to her out of the proceeds of the property of the bankrupt. We also think the learned trial court improperly exercised its discretion in denying the plaintiff permission to reopen his case and make common-law proof of the insolvency of Fannie Meng at the time when the judgment of the defendant was obtained.

We, therefore, conclude that the plaintiff's exceptions should be sustained and a new trial granted, with costs to the plaintiff to abide event.

All concurred ; SPRING and WILLIAMS, JJ., in result only.

Plaintiff's exceptions sustained and motion for new trial granted, with costs to the plaintiff to abide event.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. LOUIS WINDHOLZ, Respondent.

Cider vinegar — that part of section 50 of the Agricultural Law fixing the percentage of acetic acid which it shall contain is unconstitutional — the remainder of the section and sections 51, 52 and 53 of the statute are constitutional.

Section 50 of the Agricultural Law (Laws of 1898, chap. 338, as amd. by Laws of 1901, chap. 308) provides: "All vinegar which contains any proportion of lead, copper, sulphuric acid, or other ingredients injurious to health, or any artificial coloring matter, or which has not an acidity equivalent to the presence of at least four and one-half per centum, by weight, of absolute acetic acid, or cider vinegar which has less than such an amount of acidity, or less than two per centum of cider vinegar solids on full evaporation over boiling water, shall be deemed adulterated. The term cider vinegar, when used in this article, means vinegar made exclusively from pure apple juice. Provided, however, that cider vinegar made by a farmer in this State, exclusively from

apples grown on his land, or their equivalent in cider taken in exchange therefor, shall not be deemed adulterated, if it contain two per centum solids and sufficient alcohol to develop the required amount of acetic acid."

Held, that the section, in so far as it relates to the percentage of acetic acid which unadulterated cider vinegar shall possess, violates section 6 of article 1 of the Constitution of the State of New York and the 14th amendment of the United States Constitution, providing that no person shall be deprived of liberty without due process of law, in that it permits farmers and purchasers from farmers to deal in cider vinegar which does not contain four and a half per cent of acetic acid and prohibits all other persons from manufacturing and dealing in cider vinegar which does not possess that percentage of acetic acid;

That the remaining portions of section 50 are constitutional, as are also sections 51, 52 and 53 of the statute, which prohibit the manufacture and sale of adulterated vinegar, require the branding of packages containing cider vinegar, and impose penalties for violations of the provisions of the statute.

Per McLENNAN, P. J., and SPRING, J.; HIBCOCK, J., concurred in result; WILLIAMS and STOVER, JJ., dissented.

APPEAL by the plaintiff, The People of the State of New York, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Onondaga on the 22d day of October, 1903, upon the dismissal of the complaint by direction of the court upon the opening at the Onondaga Trial Term.

The action was commenced on the 22d day of June, 1903, to recover two penalties of \$100 each, because of the alleged violation of the provisions of sections 50, 51, 52 and 53 of the Agricultural Law (Laws of 1893, chap. 338, as amd. by Laws of 1901, chap. 308). The complaint alleged, in substance, as the first cause of action, that between the 1st day of June, 1901, and the 15th day of July, 1901, the defendant manufactured for sale, kept for sale and offered for sale adulterated vinegar; manufactured, kept and offered for sale vinegar which was made in imitation or semblance of cider vinegar; manufactured, kept and offered for sale, as and for cider vinegar, a vinegar or product which was not cider vinegar, as defined by the statute. For a second cause of action it was alleged, in substance, that between said dates the defendant manufactured for sale, offered for sale and sold several barrels or casks of vinegar made in imitation or semblance of pure cider vinegar, and which was not made exclusively from pure apple juice, but was adulterated, and

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that said barrels or casks were branded "Cider Vinegar;" that they did not contain cider vinegar, but an adulterated product made by adding substances deleterious to health, and colored so as to give it the semblance or appearance of pure cider vinegar, and was not, in fact, made from pure apple juice. Judgment for \$100 was demanded for the alleged violation of the statute, as set forth in each of said causes of action.

The defendant alleged in his answer among other things— which is the only defense urged upon this appeal—that section 50 of the Agricultural Law, which defines adulterated vinegar and pure cider vinegar, is unconstitutional and void, and, therefore, that no action predicated upon such section can be maintained. The trial court so held and dismissed the complaint, with costs in favor of the defendant. Judgment was entered accordingly, and from such judgment this appeal is taken.

M. F. Dillon, for the appellant.

Frank Hopkins, for the respondent.

McLENNAN, P. J.:

The only question presented by this appeal is whether or not section 50 of the Agricultural Law is unconstitutional and, therefore, void. The sections involved are as follows:

"§ 50. Definition of adulterated vinegar. All vinegar which contains any proportion of lead, copper, sulphuric acid, or other ingredients injurious to health, or any artificial coloring matter, or which has not an acidity equivalent to the presence of at least four and one-half per centum, by weight, of absolute acetic acid, or cider vinegar which has less than such an amount of acidity, or less than two per centum of cider vinegar solids on full evaporation over boiling water, shall be deemed adulterated. The term cider vinegar, when used in this article, means vinegar made exclusively from pure apple juice. Provided, however, that cider vinegar made by a farmer in this State, exclusively from apples grown on his land, or their equivalent in cider taken in exchange therefor, shall not be deemed adulterated, if it contain two per centum solids and sufficient alcohol to develop the required amount of acetic acid." As amended by chapter 308 of the Laws of 1901.

"§ 51. Manufacture and sale of adulterated or imitation vinegar prohibited. No person shall manufacture for sale, keep for sale or offer for sale:

"1. Any adulterated vinegar.

"2. Any vinegar or product in imitation or semblance of cider vinegar, which is not cider vinegar.

"3. As or for cider vinegar, any vinegar or product which is not cider vinegar.

"§ 52. Packages containing cider vinegar to be branded. Every manufacturer or producer of cider vinegar shall plainly brand on the head of each cask, barrel, keg, or other package containing such vinegar, his name and place of business and the words 'Cider Vinegar.' And no person shall mark or brand as or for cider vinegar any package containing that which is not cider vinegar.

"§ 53. Penalties. Every person violating the provisions of this article shall forfeit and pay to the People of the State the sum of one hundred dollars for each violation."

It was expressly held by this court that section 50 of the Agricultural Law (as amd. *supra*) is not violative of the "commerce clause" of the Constitution of the United States (art. 1, § 8, subd. 3) (*People v. Niagara Fruit Co.*, 75 App. Div. 11; *affd.*, 173 N. Y. 629), and it is not claimed upon this appeal that the section is subject to such criticism. The appellant, however, insists that the section is unconstitutional and void, because in contravention of section 6 of article 1 of the Constitution of the State, and section 1 of the 14th amendment to the Constitution of the United States, both of which prohibit the State from depriving any one of liberty without due process of law. It is well settled that a statute which by discrimination or otherwise prevents an individual's pursuing a lawful vocation, is a deprivation of liberty within the meaning of both of the constitutional provisions referred to.

The act in question applies without discrimination to all individuals, except so far as it allows farmers to manufacture, and farmers and purchasers from them to deal in, cider vinegar which does not contain an acidity equivalent to the presence of at least four and one-half per centum by weight of absolute acetic acid, while it prohibits all other persons from manufacturing and dealing in cider vinegar that has not that amount of acidity. This is clearly a discrimination in

favor of the farmer. He is permitted to engage in the manufacture of vinegar from apples raised upon his own land, or to exchange such apples for vinegar manufactured by another, and then to sell the same, even although the product does not contain four and one-half per centum by weight of absolute acetic acid, provided there is present sufficient alcohol to develop such per centum of acidity, but all other persons are prohibited from doing the same thing. Such provision is violative of both the State and United States Constitutions, and to that extent the statute is invalid.

It does not follow, however, that because of such unconstitutional provision the entire statute is void. In fact, the case of *People v. Niagara Fruit Co.* (*supra*) is necessarily authority for the proposition that the objectionable provision of the statute may be eliminated, and leave the remaining portion valid. Although the precise question was not argued upon the appeal to this court in that case, or in the Court of Appeals, as appears from the record upon appeal, it was necessarily involved, and must have been decided adversely to the respondent's contention, otherwise the judgment in that case could not have been affirmed. In fact, the question was fully discussed in the opinion of the learned referee before whom that case was tried, which was made a part of the record on appeal, both in this court and the Court of Appeals. The learned referee said :

" I conclude, therefore, that the statute is unconstitutional as violating both the State and the United States Constitutions in so far as it permits one class of citizens to engage in the manufacture and sale of cider vinegar complying with a certain standard and prohibits all others from doing the same.

" But it does not follow that the entire statute is void. There are certain provisions which are applicable to all classes and subject to no constitutional objections, which are separate and distinct in their nature from the provisions fixing a standard of a certain degree of acidity for cider vinegar. These are the definitions of adulterated vinegar, as that which contains certain specified poisons 'or other ingredients injurious to health or any artificial coloring matter,' and of cider vinegar as that which does not contain two per centum of cider vinegar solids, the prohibitions against the manufacture, keeping for sale or offering for sale of vinegar in imitation or semblance

of cider vinegar which is not cider vinegar, and offering for sale or selling as cider vinegar that which is not cider vinegar, the mandates in regard to branding cider vinegar packages and the prohibitions against branding any package as 'cider vinegar' which contains that which is not cider vinegar. These provisions, enacted for the purpose of preventing fraud, cover subjects distinct from those relating to acidity, and they create offenses accordingly. Full effect may be given to the fifty-third article* of the statute imposing penalties even though those portions of the definition of adulterated vinegar contained in section fifty which relate to acidity should be stricken out."

We think the foregoing correctly interprets the meaning and scope of the statute and is a correct exposition of the law applicable thereto. At all events we consider that the decision in the *Niagara Fruit Co. Case* (*supra*) should be regarded as decisive of the questions involved upon this appeal. In that case the allegations in the complaint, which for all practical purposes were the same as the allegations of the complaint in the case at bar, were proven, and it was held that a recovery of the penalties could be had. It follows that if the facts alleged in the complaint in this case should be proven a recovery could likewise be had. In other words, the complaint in the case at bar states facts sufficient to entitle the plaintiff to recover under each alleged cause of action.

The judgment must, therefore, be reversed and a new trial granted, with costs to the appellant to abide event.

SPRING, J., concurred ; HISCOCK, J., concurred in result ; WILLIAMS and SLOVER, JJ., dissented.

Judgment reversed and new trial ordered, with costs to the appellant to abide event.

**Sic.*

JOHN E. COLEMAN, Appellant, v. CHARLES F. HAYES, Respondent.

Venue—a defendant who notices the case for trial, and obtains a postponement of the trial until the next term of court, thereby waives his right to move for a change of venue.

Where both the parties to an action notice it for trial at a term of court to be held in the county in which the action is brought, and the defendant appears at such term of court and applies for and obtains, on the ground of the illness of a material witness, an adjournment of the trial until the next term of court, he thereby waives his right to move to have the venue changed to another county in order to promote the convenience of witnesses.

APPEAL by the plaintiff, John E. Coleman, from an order of the Supreme Court, made at the Steuben Special Term and entered in the office of the clerk of the county of Yates on the 12th day of January, 1903, changing the place of trial of the action from the county of Yates to the county of Steuben, for the convenience of witnesses.

This action was commenced by the service of the summons on the 2d day of June, 1902. The venue was laid in the county of Yates. The defendant appeared by attorney and demanded a copy of the complaint on the 9th day of June, 1902, and on the nineteenth day of July following a copy of the complaint was served upon said attorney. The answer was served on the seventh day of August and an amended complaint served by the plaintiff on the fourteenth day of October. The defendant's answer to the amended complaint was served on the thirtieth day of October, to which the plaintiff served a reply on the 10th day of November, 1902. The plaintiff thereupon filed a note of issue and caused the action to be placed upon the Trial Term calendar in Yates county for a term to be held on the 1st day of December, 1902. Both parties noticed the cause for trial at such term, and on the first day of the term the defendant, upon his own affidavit of merits, and of the illness of a material witness for the defense, by his attorney, moved for the postponement of the trial of the issues, and in said affidavit used this language: "That the said witness, who resides at Prattsburg, N. Y., has been seriously ill for several weeks last past, and is now wholly unable to attend this court, or be present at the trial of this action, in its order on the calendar, but the deponent has been informed by Robert J. Scott, M. D., the physician attending

the said witness, and verily believes that the said witness will be able to attend this court by the time of the next trial term appointed to be held at Penn Yan, N. Y., on the third Monday of May, 1903."

Thereupon the plaintiff and defendant entered into a stipulation, fixing the amount of witnesses' fees incurred by the plaintiff to be paid by the defendant at the sum of ten dollars, and the court entered an order which, after reciting the application for postponement, opposition on behalf of the plaintiff, and the stipulation as to fees of witnesses, read as follows: " * * * that the trial of the above entitled action be adjourned to the next regular trial and equity term of this court, appointed to be held in and for the county of Yates at Penn Yan, N. Y., on payment to the plaintiff's attorney of ten dollars costs, and witness fees fixed and taxed in the sum of ten dollars, within twenty days."

Subsequently and on the 10th day of December, 1902, the defendant noticed a motion, returnable on the twentieth day of that month at Rochester, Monroe county, "for an order correcting the order of postponement, mentioned in the affidavit of said Thomas (defendant's attorney), so as to make it read as stated therein by said Thomas, and for an order changing the place of trial of this action from the county of Yates to the county of Steuben, on the ground of and for the convenience of witnesses," etc.

It appeared by the affidavit of defendant's attorney used upon said motion that when the application was made for the postponement of the trial he stated to the court that he intended to move for a change of venue.

Subsequently the Special Term made an order amending said order of postponement upon the ground that it did not comply with the terms of the order as granted by the court, in that it was not intended to set the cause down for trial at the May term, 1903, and upon the affidavits presented by the defendant in support of his motion to change the place of trial, the court ordered that the trial be held in the county of Steuben instead of the county of Yates, wherein the venue was during all the time prior to the entry of such order, to wit, the 12th day of January, 1903.

From the order changing the place of trial this appeal is taken.

Lyman J. Baskin, for the appellant.

Monroe Wheeler, for the respondent.

McLENNAN, P. J. :

The sole question presented upon this review, requiring serious consideration, is whether the defendant, by serving his notice of trial for the December Trial Term in 1902 to be held in the county of Yates, and by appearing at such term and applying for and receiving the advantage of a postponement of the trial beyond that term of court, waived his right to move the court subsequently for a change of venue to another county.

In the case of *Haiz v. Starin* (1 N. Y. St. Repr. 553), which was an action brought in the wrong county, and to the removal of which to the proper county the defendant was entitled as a matter of right unless such right had been waived, the court said : "The receipt of the extension of time, subject to stipulation by defendant to take short notice of trial for the March circuit in Westchester, was a waiver of the right to change the place of trial to the proper county. The defendant accepted a benefit from the plaintiff under an agreement that he would try the case in Westchester county. After receiving the advantage of a stipulation it was too late, and against good conscience, to repudiate the consideration."

In *Nash v. Silver Lake Ice Co.* (6 N. Y. Supp. 913) the defendant applied for three extensions of time to answer, which were granted. A motion by the plaintiff to shorten the time of the defendant to answer was denied, upon defendant stipulating to "accept short notice of trial at the May term of this court" and to "apply for no further extension of time to answer." Upon a subsequent motion by the defendant for the removal of the cause to the proper county it was held that by accepting the denial of plaintiff's motion, and stipulating to accept short notice of trial for a specified term in the county wherein the venue rested, the defendant waived its right to have the same removed to another county, even although otherwise it would have been entitled to such removal as a matter of right. (*Rodis v. Verdon*, 22 Misc. Rep. 409.)

It seems to us that the grounds upon which the decisions in the cases cited were based were sound and equitable, and in principle apply to the case at bar.

The defendant's notice of trial advised the plaintiff that he expected to try the cause at the December term. It in terms said :

"The above cause will be brought to trial at the next trial term of this court, appointed to be held in and for the county of Yates, at the Court House in the village of Penn Yan on the 1st day of December, 1902."

And acting upon that notice the plaintiff prepared for the trial at that term.

Under the circumstances of this case we think it should be held that the service of the notice of trial, and the motion for a postponement of the trial upon the ground of the illness of a material witness for the defense, constituted a waiver of the defendant's right to afterwards move for a change of venue. The application for the postponement was in harmony with the evident intention of the defendant to try the cause in Yates county, and "good conscience" should prevent his being permitted to secure an advantage for which he apparently was willing to pay by way of costs the sum of twenty dollars, and then attempt to "repudiate the consideration" to the prejudice of the plaintiff, by a subsequent motion to change the place of trial.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

MARSHALL J. ROOT, as Administrator, etc., of JOHN B. CROSBY, Deceased, Respondent, v. LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, Appellant.

Accident insurance policy excluding injuries "of which there is no visible mark on the body" — pallor, emaciation and decline constitute "visible" marks — incorrect statement of full particulars of the accident — refusal to permit the insurer to hold an autopsy — laches in the demand therefor.

In an action upon a policy of insurance, "against bodily injuries sustained wholly and exclusively through external violence occasioned accidentally by visible means," it appeared that the policy provided "That this insurance does not cover injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark)."

The insured, an athletic man, in vigorous health, fell from a bicycle and broke his right femur. Immediately after the accident he complained of intense

pain in his back between the shoulder blades and in his chest. There were no visible marks upon the insured's back or chest. The fractured femur reunited, but the pains continued with increased intensity until the insured finally died. The physician attributed his death to angina pectoris caused by the fall from the bicycle. Immediately after the accident the insured's face became pallid and he began to decline, which condition continued progressively until his death.

Held, that the insurance company was not relieved from liability under the provision of the policy, "That this insurance does not cover injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark);"

That the insured's pallor, emaciation and decline furnished visible signs of his injury;

That where it is plain that an accident has occurred and severe injuries have resulted and it is a fair deduction from the circumstances that death ensued as the direct consequence of such accident the policy should be construed to hold the defendant liable, even though no contusions or marks appear upon the body;

That a notice sent by the insured to the defendant the day after the accident, describing in detail the manner and time of the accident and that the injury sustained was a broken hip bone, this being the best information then possessed by the insured and his physician, constituted a sufficient compliance with the provision of the policy requiring the written notice to contain "full particulars of the accident;"

That a breach of a provision in the policy, that "any medical adviser of the company shall be allowed to examine the * * * body of the assured," could not be predicated upon the refusal of the defendant's demand for an autopsy, made the day after the insured had been buried, it appearing that the defendant knew of the insured's death two days before his burial and that the demand for the autopsy was not made upon any of the insured's relatives, but upon a person who was subsequently appointed administrator of the insured's estate;

That the delay of the defendant in making the demand for the autopsy was unreasonable.

APPEAL by the defendant, the London Guarantee and Accident Company, Limited, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Erie on the 13th day of August, 1903, upon the verdict of a jury for \$5,175, and also from an order entered in said clerk's office on the 13th day of June, 1903, denying the defendant's motion for a new trial made upon the minutes.

Frank Gibbons, for the appellant.

Louis L. Babcock, for the respondent.

SPRING, J. :

This action is by the administrator of John B. Crosby, deceased, to recover on an accident policy issued by the defendant December 3, 1901, for one year and which insured against death by accidental means.

The proof shows that Crosby fell from a bicycle on Irving place in the city of Buffalo on the 20th day of June, 1902, fracturing his right femur and it is claimed sustaining other injuries which culminated in his death on the tenth day of August following. At the time of the accident Crosby was fifty-one years of age, of robust health, vigorous in his mode of life, temperate in his habits and careful of his diet. Immediately after the accident his face was pallid, he became emaciated and complained constantly of intense pain in his back between the shoulder blades and in his chest. These anginal pains increased in intensity, and the spasms were intermittent and prostrating to the time of his death. From the evening of the injury he was unable to lie down, but was compelled to sit up by reason of the severity of the heart spasms. The fractured femur recovered and this injury did not necessitate his sitting up. The physicians, in response to a hypothetical question fairly containing the facts proven, attributed the death to angina pectoris, caused by the accident in falling from his bicycle.

The evidence of the laymen corroborated the professional opinions of the plaintiff's medical experts. Miss Slater, who saw him daily, testified: "He was very pale. The foot of the bed was raised, and he was all built up with pillows. He assumed in bed almost a right angle; almost sitting upright. I saw him, from time to time, from this first Saturday after the injury up to the time of his death, almost every day. I would visit him both at the General Hospital and at Mr. Root's house. He was pale and weak, and grew weaker every day. When I would go in the morning I would ask him how he felt; he would say that he didn't seem to have much trouble with the hip, but the pains of the back and chest still continued, and he seemed to grow weaker every day. His position in bed was just the same about as it was—well, the limb was laid straighter, but he was almost sitting up in the bed. I never saw him during all this period lie down."

Cochrane, who also was with him every day, described his condition,

saying: "He was injured on Friday evening; I saw him on Saturday afternoon. In appearance he was a man that was suffering a great deal; he was sitting in bed, or, at least, he was propped in bed at about an obtuse angle to a right; he was very pale and he complained to me about his general discomfort and suffering. He said he suffered more in his body than he did from the broken leg."

He also said that the pains complained of were between the shoulder blades and in his back. The fact, therefore, appears that Crosby, an athletic man, in vigorous health and in the prime of life, began to decline from the day of the injury and progressively weakened until death intervened. The jury were amply justified from the evidence in finding that his death was due to the injury received in the fall from the bicycle, and which was sufficiently violent to break the large bone of his leg.

By the provisions of the policy the defendant insured Crosby in the sum of \$5,000 "against bodily injuries sustained wholly and exclusively through external violence occasioned accidentally by visible means." It further provides: "That this insurance does not cover injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark)."

The physicians testified that the heart spasms were not attributable to a broken femur. There was no visible mark on the back or chest and the appellant contends that the anginal pains even though resulting from the accident do not bring the case within the compass of the policy. We think this is too narrow a construction to put upon its language. Where it is plain that an accident has occurred and severe injuries have resulted and it is a fair deduction from the circumstances that death ensued as the direct consequence of such accident the policy should be construed to hold the defendant liable even though no contusions or marks appear upon the body. A man may be killed by a blow over the heart, or by drowning or by falling from a balloon and death ensue before reaching the ground and in each instance there may be no mark upon the body, yet the death is by accidental means and should be within the purview of the policy.

In *Menneiley v. Employers' Liability Assurance Co.* (148 N. Y. 596) the policy contained the clause that it "does not insure against death or disablement * * * from accidents that shall bear no

external and visible marks." The insured met his death while in bed from the inhalation of illuminating gas but there was no mark upon his body. The Court of Appeals in construing this provision say at page 602: "It is somewhat difficult to understand precisely what was intended by this clause of the policy. We are, however, of the opinion that the language employed, when fairly construed, indicates that its purpose was to provide that a case of death or injury should not be regarded as within the policy, unless there was some external or visible evidence which indicated that it was accidental. In other words, that only such injury as could be shown by external and visible evidence to have been accidental should be regarded as within the policy."

The court further say that illuminating gas was discoverable in the room, and emanated from his body upon the production of artificial respiration, and the court add: "We think this admission furnishes sufficient evidence of an external and visible character that the death of the decedent was accidental to exclude it from this exception in the policy, and hence that it was one of the accidents against which the defendant intended to insure."

Crosby's pallor and emaciation and decline were apparent after the accident, and furnished visible signs of the injuries. In *Mutual Accident Association v. Barry* (131 U. S. 100) the insured jumped from a platform to the ground and died nine days thereafter, and there was no mark upon his person. The policy excluded "any bodily injury of which there shall be no external and visible sign." The court, in charging the jury, said (at p. 111): "Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury." A recovery was had which was sustained in the United States Supreme Court. (See, also, *Gale v. Mutual Aid & Accident Association*, 66 Hun, 600.)

The defendant evidently intended that this clause should exclude liability in case of death from accident unless there is a visible mark upon the body. It is very doubtful whether the scope of the

language will be so extended in any event. (*Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; *McGlinchey v. Fidelity & Casualty Co.*, 80 Me. 251.)

The appellant claims that proper notice of the character of the accident was not given. The policy required that the written notice shall contain "full particulars of the accident." On the day after the accident Crosby signed a written notice describing in detail the manner and time of the accident, and that the injury sustained was a broken hip bone. That was the sole injury, so far as he knew, and the physician in attendance did not appreciate the import of the pain of which he complained. He gave to the defendant the best information he possessed or that was available at the time.

The proofs of death furnished to the defendant were sufficiently explicit. Dr. Hopkins described the manner of the accident and the injuries and cause of death as follows: "On June 20, 1902, he fell from his wheel receiving a fracture of his right femur, and some injury to his chest which resulted in an attack of angina pectoris from which he died."

The policy contains the provision that "any medical adviser of the company shall be allowed to examine the * * * body of the assured." Crosby died on Sunday and was buried on Wednesday. On Thursday Mr. Williams, a representative of the defendant, applied to have an autopsy performed. Mr. Root declined to have the body exhumed for that purpose. He was not a relative of the decedent and had not then been appointed administrator. It was not within his province to grant the privilege. There is no suggestion that any application for the autopsy was ever made to the relatives of the decedent. Mr. Williams knew of Mr. Crosby's death the day after it occurred and conversed with the plaintiff on that day but did not then ask that an autopsy be made at the instance of the defendant. The delay until after the burial was unreasonable. (*Wehle v. U. S. Mut. Accident Assn.*, 153 N. Y. 116; *Ewing v. Commercial Travelers' Accident Association*, 55 App. Div. 241.)

The judgment and order should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

BYRON J. STROUGH and LUCIEN S. STROUGH, Appellants, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Railroad — it must use reasonable diligence to furnish an adequate number of freight cars — increase of the freight rates pending a failure to furnish cars — payment of an increased freight rate with knowledge that ten days' notice of the increase had not been given as required by the Interstate Commerce Law.

It is incumbent upon a railroad company to exercise reasonable care and diligence to furnish cars adequate for the transportation of freight tendered to it, but it is not obliged to discriminate in favor of a particular shipper, where the demands upon its transportation facilities exceed its capacity and the anticipated or usual calls upon it.

Where the neglect of a railroad company to furnish a shipper with sufficient cars for the transportation of freight which he desires to ship is not unreasonable, and, while the shipper is endeavoring to secure the necessary cars, the railroad company makes a reasonable increase in its freight tariff for the particular class of freight in question, the shipper, who has paid such increased charge, cannot recover such increase from the railroad company.

A shipper who voluntarily and without objection pays an increased freight rate upon the goods shipped by him, with knowledge that the railroad company had not given the ten days' notice of the change in the freight rates as required by the Interstate Commerce Act, is not entitled to recover from the railroad company the excess freight charge.

APPEAL by the plaintiffs, Byron J. Strough and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Jefferson on the 23d day of May, 1903, upon the verdict of a jury dismissing the complaint upon the merits, and also from an order bearing date the 4th day of May, 1903, and entered in said clerk's office, denying the plaintiffs' motion for a new trial made upon the minutes.

Wayland F. Ford, for the appellants.

Henry Purcell, for the respondent.

SPRING, J. :

The plaintiffs were dealers in hay living at Lafargeville in the county of Jefferson. In the summer and fall of 1899 they purchased of the farmers living near the several local stations along the defendant's line a large quantity of hay, designed to be shipped to New York and Boston. The hay was pressed by the plaintiffs

and stored in barns near the defendant's railroad, except such part as was shipped as it was drawn in by the farmers. Before purchasing the hay the plaintiffs made inquiries of the local station agents of the defendant and also of its division freight agent to ascertain if there was to be any increase in the tariff charge for the shipment of hay and were informed by each of said agents that there was to be no increase so far as such agent knew.

During the year 1899 and for sometime prior thereto, hay had been classified in what was known as the sixth class of merchandise. The charge on this class of freight from Jefferson county to New York and Boston was seventeen cents per hundred.

From the first of September to the first of January the plaintiffs shipped over defendant's line quite a large quantity of this hay but were unable to procure sufficient cars to transport all they had on hand for shipment. They made demands daily of the various local agents for more cars but were unable to procure them. One of the causes of action contained in the plaintiffs' complaint is that the defendant unreasonably neglected to provide a sufficient number of cars to forward this freight. That question was properly submitted to the jury (*Root v. L. I. R. R. Co.*, 114 N. Y. 300) and their verdict determines that the defendant was not unreasonable in its failure to provide sufficient cars. The defendant's general traffic manager testified that during the fall of 1899 there was an unusual and extraordinary call for freight cars and especially for the transportation of perishable goods, and apparently preference was given to the shipment of goods of that character. The defendant was not apprised of any urgent necessity for the shipment of this hay. It was not within the class denominated perishable merchandise and its sale in midwinter might as readily be made as earlier in the season. It was not, therefore, called upon to put forth any unusual efforts to remove the hay. The ordinary duty of exercising reasonable care and diligence as a common carrier to furnish cars adequate for the transportation of freight was incumbent upon it, but not to discriminate in favor of the plaintiffs where the demands exceeded the capacity of the defendant and the anticipated or usual calls upon it. So, under the evidence, it was a fair question of fact whether there was any unreasonable neglect on the part of the defendant to furnish the plaintiffs with the cars which they needed.

On the first of January hay was placed in the fifth class of merchandise, involving an increase in the freight rate to Boston of eighty cents on a ton and to New York of sixty cents. The claim of the plaintiff is that after this increase in the tariff rate they shipped to Boston one hundred and thirty-two carloads of hay and to New York eleven carloads, each containing about ten tons. The plaintiffs paid the increased freight charge, amounting as they claim to \$1,194.45, and they seek to recover this excessive rate. It is further claimed that the price of hay in these cities decreased one dollar a ton after the first of January, but the cause of action founded upon that claim was abandoned on the trial.

The Interstate Commerce Act (24 U. S. Stat. at Large, 381, § 6, as amd. by 25 id. 856) provides that, before any advance is made in freight charges, a public notice thereof of ten days shall be given, stating the changes to be made and the date when the increased rate is to go into effect. The notice in this case was posted at the station of the defendant at Lafargeville on the twenty-fifth day of December, and the new tariff charge became operative on January first following. The requisite ten days' notice was not, therefore, given. The plaintiffs knew of this notice when it was first posted and continued to ship their hay, paying the increased rate without a murmur until all had been shipped. It does not appear that any part of the same was loaded in the first few days of January, so that the plaintiffs, we may say, did have the full ten days' notice before they delivered their hay to the defendant.

Nor did they make any complaint in any way of the increased charge the defendant had imposed. They paid the money voluntarily and they cannot now recover it back. (*Vanderbeck v. City of Rochester*, 122 N. Y. 285; *Newburgh Savings Bank v. Town of Woodbury*, 173 id. 55; *Killmer v. N. Y. C. & H. R. R. Co.*, 100 id. 395, 401; *Bennett v. Bates*, 94 id. 354, 373.)

We think it was no error for the court to decline to permit the jury to pass upon the question as to whether this increased rate was unreasonable or not. There was no proof given on the part of the plaintiffs to sustain that charge, and their voluntary assent to it implies that the rate was reasonable. Again, there was no implied agreement whereby the plaintiffs were entitled to ship the hay at the old rate. A discrimination of that kind excepting the plaintiffs

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from the general freight tariff would be against public policy, and simply because a man has on hand a large quantity of merchandise which he intends to have transported by a common carrier does not relieve him from any reasonable increase in the freight charge which may be made while the goods are in his custody for future transportation. The fact that they endeavored to obtain the cars to ship the goods before the increased rate became operative does not change this rule, as the jury have found that the defendant did not neglect improperly to perform its duty in furnishing cars.

The other cause of action is upon an assigned claim made by one Tallman, who was also a hay shipper living at Lafargeville. The facts pertaining to that cause of action are also identical with plaintiffs' own claim.

The judgment should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

CHARLES W. MAIER, Plaintiff, v. JOSEPH H. REBSTOCK, Defendant.

Agreement by a vendor of lands to repurchase the premises "at the end of three (3) years" — the vendee has a reasonable time thereafter in which to elect to reconvey — what is a reasonable time — a delay of five years — effect of a sale of part of the premises by the vendee.

Where a vendor of lands, contemporaneously with the sale and as part of the consideration therefor, executes and delivers to the vendee the following instrument: "I hereby agree, if at the end of three (3) years you can't sell at an advance to cover six (6) per cent. interest on investment, I will take the land back and refund money, also pay you six (6) per cent. interest and all other expenses connected with transfers, recording, etc.," the vendee has a reasonable time after the expiration of the three years specified in the contract in which to elect to reconvey the lands; he is not, however, entitled to await a favorable turn in the market and still hold the vendor liable under the guaranty.

What is a reasonable time, in view of all the circumstances, is ordinarily for the jury to determine.

When, in an action brought by the vendee against the vendor, five years after the expiration of the three years specified in the guaranty to recover upon such guaranty, it is a question for the jury to determine whether the vendee, during the three years stipulated in the guaranty, exercised reasonable diligence in

attempting to sell the lands and whether the vendor acquiesced in the subsequent delay, appreciating that his liability upon the guaranty still existed, considered.

If the vendee, by a sale, or contract of sale, of an interest in the premises, has obtained partial reimbursement, the vendor's liability upon the guaranty is reduced *pro tanto*.

MOTION by the defendant, Joseph H. Rebstock, for a new trial made upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance, upon the verdict of a jury in favor of the plaintiff, rendered by direction of the court, after a trial at the Seneca Trial Term.

Clarence A. MacDonald, for the plaintiff.

Arthur W. Hickman, for the defendant.

SPRING, J. :

On January 10, 1893, defendant conveyed to the plaintiff a parcel of land situate in the city of Buffalo for \$720; of the purchase price, \$220 were paid in cash and \$500 were secured to the vendor by the bond and mortgage of the vendee due in three years from date. Contemporaneous with the delivery of the conveyance the vendor executed, as a part of the consideration of the transaction, the following instrument :

“BUFFALO, N. Y., *Jany. 10th*, 1893.

“GUARANTY TO CHAS. W. MAIER.

“I hereby agree, if at the end of three (3) years you can't sell at an advance to cover six (6) per cent. interest on investment, I will take the land back and refund money, also pay you six (6) per cent. interest and all other expenses connected with transfers, recording, etc.

“JOSEPH H. REBSTOCK.

“Per S. J. REBSTOCK, *Atty.*”

The plaintiff claims that he has been unable to sell the land and has sued upon the agreement to recover the purchase price and taxes which from time to time have been levied upon the land and paid by the plaintiff. By the terms of the agreement the three years stipulated therein expired on January 10, 1896, but the present action was not commenced until July, 1901. On the trial the

court directed a verdict for the plaintiff for the full amount of the purchase price, together with interest and the taxes paid, including interest thereon. In this we think the court erred. As we interpret the agreement, the plaintiff had a reasonable time after the expiration of the three years' limitation in which to reconvey the land to the defendant. He was not permitted to make an election to await a favorable turn in the selling price and still keep his grip on the liability of the defendant. What is a reasonable time in view of all the circumstances is ordinarily for the jury to determine. (*Pierson v. Crooks*, 115 N. Y. 539, 551; *Grabfelder v. Vosburgh*, 90 App. Div. 307.)

The plaintiff allowed five years to elapse before endeavoring to hold the defendant on the agreement. If nothing had transpired in the interim indicating that the defendant acquiesced in this delay or allowed the time to run along realizing that his liability continued, then, as matter of law, he would be absolved therefrom. A brief review of the conduct of the parties after the expiration of the three years' limitation will aid us in appreciating the real situation.

The plaintiff testified to his fruitless efforts to sell the land during the three years, and that he continued his efforts thereafter. In February, 1896, which was shortly after the expiration of the time period in the agreement, he put the lots for sale in the hands of real estate dealers in Buffalo and for a year and a half they had charge of the property as selling agents, but made no sale. The plaintiff testified he never had any offer for this property except he states in a letter that he was once offered four dollars a foot, which was far below the purchase price. He has testified that he often talked with the defendant in regard to the prospect of selling this land and was advised that it was good. He saw him once or twice each year down to 1899 or 1900 in reference to selling the land, but was unable to make any sale. He resided in Seneca Falls and knew but little concerning the value of the land, while the defendant was a resident of Buffalo and apparently familiar with the selling value of property of this kind and appreciated the difficulty in disposing of it. Whenever the plaintiff was in Buffalo he met the defendant and they talked over the situation in reference to this land.

On the 7th of February, 1901, he wrote to the defendant that "As

you know, we have been trying to sell them ever since we bought, but have never had but one offer and that was for \$4.00 a foot." He then called attention to the agreement of the defendant to "take the lots back" if they were unable to sell within the three years. He then adds: "We have held off, thinking perhaps that we could get rid of them, but as there don't seem to be much prospect, thought that I would write you, and get the thing closed up." The defendant replied to this and another letter, not in evidence, saying he had "been making inquiries;" that real estate was "picking up and there is no question that you will be able to sell, and I think at a profit, this summer." It will be noted that the defendant does not claim that the plaintiff had elected to retain the land or that the agreement had become inoperative by lapse of time. The plaintiff thereupon wrote two letters to the defendant advising him that he desired to reconvey the land and receive the purchase price and expenses in accordance with the contract of the defendant. He says in the letter of February twentieth: "The 6 per cent investment under your guarantee is profit enough for me, and I want to settle the thing up. Our agreement, when I bought the lots, was that you would take them off my hands, if I were unable to sell them, and this is what I want you to do. If, as you think, values will rise, you will be the gainer. You are on the ground and can look after them, while I am not, and could not watch the market so as to know when was the best time to dispose of them. In thinking it all over I want the guarantee fulfilled."

And in the letter of April fourth: "I expect you to fulfill that guarantee and cannot see why I should wait until you make inquiries as to the value of the property." On the twentieth of April the attorneys for the plaintiff wrote to the defendant insisting upon a prompt adjustment of the matter. In response to this letter the defendant on the twenty-fifth of April wrote to the plaintiff saying: "I will keep my agreement made with you. I hardly think it necessary to employ an attorney. I haven't the cash on hand at present but think I will be able to arrange it this Fall. Will you send me a copy of the agreement; hope this will be satisfactory to you." The defendant not only does not repudiate his liability or claim that the plaintiff has deferred his demand too long, but distinctly recognizes the binding force of the agreement. The defend-

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ant in his testimony did not claim that he told the plaintiff he was not liable on this agreement, and he did not deny that after the expiration of three years the plaintiff repeatedly conferred with him in regard to selling the lots and as to the prospect of finding a purchaser.

In view of all of this testimony, supported and elucidated by the correspondence mentioned, we think it was for the jury to determine in the first place whether the plaintiff during the three years stipulated in the agreement exercised reasonable diligence and made proper efforts to sell these lots. In the second place it was for the jury to find whether the defendant, under all the circumstances, acquiesced in the delay which was made, appreciating that his liability, in compliance with the agreement, was subsisting during all of this time. If so, the jury might say the plaintiff commenced his action seasonably.

Soon after the purchase of the land the plaintiff, by some arrangement, the nature of which is not clearly disclosed by the record, transferred some interest in this land, or the profits which might accrue therefrom, to his brother, Edward Maier. The latter paid to the plaintiff one-half of the cash payment, one-half of the bond and mortgage, and one-half of the taxes falling due from time to time. If this arrangement was equivalent to a sale of one-half of the premises, then the plaintiff, to the extent of the money received, must give credit upon the agreement sued upon. If the plaintiff had sold to his brother the entire parcel of land, receiving the full purchase price paid by him, but retaining title in himself because of an agreement that he was to share in any profits which might accrue from the sale of the land, I take it the arrangement would relieve the defendant from his liability on the agreement. That contract was designed to indemnify the plaintiff against any loss on his investment by insuring its repayment or reimbursement, including the taxes and incidental expenses provided for in the agreement. If he received the full return of his investment with interest and taxes, by virtue of another agreement, so that he has lost nothing, then the defendant should not be called upon to pay. If he has received in part the purchase price, a ratable reduction should be made of his claim against the defendant. The maximum limit of the latter's liability is the loss sustained by the venture of the plain

tiff. If the plaintiff has been in part reimbursed by a sale or by a contract tantamount to a sale, in that it lessened his loss, he should be content if the defendant is held bound to him for the balance of his investment.

The defendant offered in evidence certain letters of said Edward Maier to him, and which are referred to in the letters of the plaintiff to the defendant, and they were excluded by the court. Later the defendant sought to show that he offered to Edward Maier to take the land back "if they were not satisfied" with it; "that he had an offer of \$14 per foot." This was also excluded. Without going into the evidence in detail we think Edward Maier is sufficiently connected with this land transaction to render the evidence offered competent. The two brothers were, to some extent at least, interested in the speculation and were together endeavoring to sell the lots, and together were writing and conferring with the defendant in regard to them. The act of one was the act of the other and was so recognized by the plaintiff.

The defendant's exceptions should be sustained and the motion for a new trial granted, with costs to the defendant to abide the event.

WILLIAMS and HISCOCK, JJ., concurred; McLENNAN, P. J., concurred in result only in separate opinion, in which STOVER, J., concurred.

McLENNAN, P. J. (concurring):

I concur in the result reached in this case, that the defendant's exceptions should be sustained and a new trial granted, but I dissent from the views of the majority of the court as expressed in the prevailing opinion, viz.: That it is for the jury to determine whether or not the plaintiff made his election to resell, and tendered a reconveyance of the premises in question to the defendant within a reasonable time, and in other respects complied with the terms of the agreement upon which he seeks to recover.

It seems to me that, upon the facts disclosed by the record in this case, it should be held as matter of law that the plaintiff is not entitled to recover, and that the defendant's motion for a nonsuit should have been granted.

The facts, so far as material, are not in dispute. On the 10th

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day of January, 1893, the defendant sold and by quitclaim deed conveyed to the plaintiff a parcel of land, being sixty feet front on Goethe street in the city of Buffalo, N. Y., for the consideration of \$720, or \$12 per front foot. Two hundred and twenty dollars of the purchase price was paid down, and the payment of the remaining \$500 was secured by a bond and mortgage upon the premises, due in three years and bearing even date with said deed, duly executed by the plaintiff and delivered to the defendant. At the same time, and as part of the consideration of the purchase, the defendant executed and delivered to the plaintiff the following instrument:

“BUFFALO, N. Y., *Jany. 10th*, 1893.

“GUARANTEE TO CHAS. W. MAIER.

“I hereby agree, if at the end of three (3) years you can't sell at an advance to cover six (6) per cent. interest on investment, I will take the land back and refund money; also pay you six (6) per cent. interest and all other expenses connected with transfers, recording, etc.

“JOSEPH H. REBSTOCK,

“Per S. J. REBSTOCK, *Atty.*”

Immediately upon the execution of said deed and guaranty and their delivery to the plaintiff, he entered into possession of the premises.

The evidence clearly indicates that the plaintiff purchased the property solely for the purpose of speculation. He had never seen it at the time, nor until more than a year afterward. He and the defendant had been intimate friends for a long period, and the plaintiff relied solely upon the representations made by the defendant as to the value of the property, present and prospective. The plaintiff evidently thought he had a good thing if he continued to hold the property, for he really made no attempt to sell it for nearly a month after the expiration of three years from the time when he purchased the same. The plaintiff testified: “Usually, always, I might say, I saw the defendant and talked with him about the prospects of selling the property. He told me he would put a sign on with the words ‘For Sale,’ and his own name and address, and if any possible purchaser came he would try to sell to them.”

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This is all the plaintiff did by way of attempting to sell the property until after the expiration of the three years. He did not authorize the defendant to sell it; no selling price was fixed; at the most the defendant was only empowered to let the public know the premises were for sale; his only relation to the property was that of a friend of the plaintiff, endeavoring to find a purchaser at a price which would be approved by him, and during those three years the plaintiff never suggested or intimated to the defendant that he, the plaintiff, might elect to reconvey the property, or that he was not entirely satisfied with his purchase as a speculative investment.

On and after January 10, 1896, "the end of three (3) years" from the date of the conveyance, and upon the expiration of the option period mentioned in the contract, what did the plaintiff do to indicate that he would require the defendant to repurchase the property? Absolutely nothing. On the contrary, he continued to exercise all acts of ownership over the property the same as before; and a month later, without consultation with the defendant, so far as appears, placed the property in the hands of Chadeayne & Colter, real estate agents of Buffalo, for sale, and fixed the price at eighteen to twenty dollars per front foot, which, if the land was sold at that price, would have netted him a profit of several hundred dollars. In that regard the plaintiff testified: "I held that property and gave it to Chadeayne & Colter for sale in February, 1896; I fixed a price of eighteen or twenty dollars per front foot; that was the selling price which I fixed on it at the start, and I kept that price right along; there were sixty feet. Chadeayne & Colter had it about a year and a half; after a while I put it down to eighteen dollars a foot, and asked if they could get an offer."

Thus it appears that a month after the expiration of the option period the plaintiff, without having demanded that the defendant repurchase the property, and without having offered to reconvey the same, continued for a year and a half to offer it for sale at a price greatly in excess of what it cost him and, so far as appears, never offered it for sale at a price which would only equal such cost. Indeed, for five years after the expiration of the option period, the plaintiff was actively engaged in endeavoring to sell the property at such a price as would yield him a large profit upon his

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investment. It is true, however, that during that time he received no offer for the property in excess of four dollars per front foot, which was much less than its cost. During all this time the plaintiff frequently consulted with the defendant as to the actual and prospective value of the property, as to what could probably be realized from it, as to what assistance the defendant could render in the way of securing an advantageous sale of the same, but throughout such consultations, conversations or negotiations, continuing over a period of five years, there cannot be found a single word in the evidence to indicate that the plaintiff ever intimated or suggested to the defendant that he, the plaintiff, was dissatisfied with his purchase or investment, or that he elected or would elect to require the defendant to repurchase the property under his agreement of guaranty.

It, therefore, appears without contradiction that for a period of more than eight years after the purchase of the premises, and for more than five years after the expiration of the option period, the plaintiff never elected to sell, offered to reconvey, or tendered to the defendant a deed of the premises, or in any manner intimated or suggested that he elected or would elect so to do, or that he would seek to hold the defendant liable upon his guaranty.

On the 7th day of February, 1901, five years and nearly a month after "the end of three (3) years," the plaintiff for the first time demanded of the defendant, by letter dated that day, that he repurchase the property and refund to him the purchase price, costs and expenses, and interest upon the whole at the rate of six per cent per annum. He evidently had then become satisfied that speculation in Buffalo real estate would not yield the great profits anticipated, and concluded, as stated in a letter written to the defendant on the 20th day of February, 1901, "I want to close the thing up now and get out of Buffalo real estate. The 6 per cent investment under your guarantee is profit enough for me, and I want to settle the thing up." In answer to the plaintiff's demand the defendant stated in a letter dated April 25, 1901: "Will say that I will keep my agreement made with you. I hardly think it necessary to employ an atorney. I haven't the cash on hand at present, but think I will be abel to arrange it this Fall." If the defendant was not liable to the plaintiff upon the guaranty prior to the writing of

such letter, it cannot be contended that he thereby became liable. The defendant finally refused to comply with the demand of the plaintiff that he repurchase the property, and this action was commenced.

This appeal only involves the construction and meaning of the guaranty agreement. No question of estoppel is involved. If the plaintiff had said to the defendant, immediately prior to or at the expiration of the option period, I am about to or intend to elect to resell the property to you, and to hold you liable upon your agreement; and the defendant had said something or done some act which had led the plaintiff to refrain from making such election at the time; or if the option period had been extended by agreement between the parties, then another question would be presented; but there is no suggestion of that kind in the evidence. As we have seen, the plaintiff never even intimated, either by word or act, that he contemplated electing to require the defendant to repurchase the property, or that he regarded the defendant liable upon his guaranty, until the 7th day of February, 1901. In fact, his course of conduct in respect to the property during the entire period of five years was inconsistent with such an election on his part. During that entire time he was endeavoring to sell the property at a large profit, and not for a sum simply equal to his original investment, such profit, if realized, being for his exclusive benefit. The guaranty agreement is plain and unambiguous. It is nothing more than an agreement on the part of the defendant to repurchase the property of the plaintiff at a specified price, "at the end of three (3) years," if the plaintiff shall elect to sell at that time. The plaintiff did not make such election "at the end of three (3) years," or until more than five years thereafter, and his failure so to do, so far as appears by the evidence, was in no manner influenced by any word or act of the defendant. It would seem, therefore, that upon any reasonable construction of the contract it should be held, as matter of law, that the plaintiff is not entitled to recover.

It is said in the prevailing opinion: "In view of all of this testimony, supported and elucidated by the correspondence mentioned, we think it was for the jury to determine in the first place whether the plaintiff during the three years stipulated in the agreement exercised reasonable diligence and made proper efforts to sell these

lots. In the second place it was for the jury to find whether the defendant, under all the circumstances, acquiesced in the delay which was made, appreciating that his liability, in compliance with the agreement, was subsisting during all of this time. If so, the jury might say the plaintiff commenced his action seasonably."

As to the first proposition, while we do not think the question material in this case, it may be said there is not a particle of evidence to indicate that the plaintiff really attempted to sell the property during the three years after he purchased the same; he never fixed a price for which he would sell it. As we have seen, the most he did was to ask the defendant to make it known that the property was for sale, and to place a sign thereon indicating that fact. As to the second proposition, we think it entirely immaterial whether or not the defendant acquiesced in the delay in the sale of the property. He could do nothing else but acquiesce. The defendant could not sell the property. The plaintiff could keep it or sell it, as he saw fit. He alone had the right of election. The plaintiff was the actor. The defendant had no act to perform until the plaintiff made demand for the purchase price and tendered a conveyance of the property, and unless such demand and tender were made the defendant could not be called upon to act. What should the defendant have done in this case? Was he required to go to the plaintiff and offer to buy back the property? Inquire whether the plaintiff was dissatisfied with his purchase and would be likely to demand the repayment of the purchase price? No such duty was imposed upon the defendant in the premises; he had no right of election. Such right belonged exclusively to the plaintiff, and unless exercised in accordance with the terms of the contract was lost forever.

We think the authorities fully sustain the defendant's contention. *Lester v. Jewett* (11 N. Y. 453) was an action brought to enforce the following agreement: "For value received, I agree at the expiration of one year from this date to purchase thirty shares of the capital stock of the Southern Life Insurance and Trust Company, of Ralph Lester, of the city of Rochester, for the sum of three thousand dollars. Dated September 6th, 1839. (Signed) Simeon B. Jewett."

It was held: "To entitle the vendor to recover upon the agreement, he must aver and prove a tender or offer to sell and transfer

the stock to the party contracting to purchase, at the expiration of the year."

It was also said in that case (p. 454), per EDWARDS, J.: "If the instrument upon which this suit is brought be construed according to the plain rules of common sense, without regard to legal subtleties and refinements, it seems to me that there can be but little difficulty in coming to a conclusion as to its true meaning and effect. The defendant agrees to purchase thirty shares of stock, on a particular day, at a fixed price. No credit whatever is given. Now, what is he bound to do in order to make such a purchase? He certainly is not bound to pay the price agreed upon, without receiving anything in return. A cash purchase can only be made by a payment of the purchase money on the one side, and a delivery of the thing purchased on the other. These are, and must necessarily be, concurrent acts. The purchaser is not bound to pay the purchase money unless he receives the thing purchased; and how can it be said that he has refused to receive the thing purchased, and to pay the money for it, when he has never had the opportunity of receiving it? I cannot perceive how a person can be said to be in default for not doing a thing, when the party who alleges his default, and who alone could put it in his power to do the thing, has neglected to do so."

In the case at bar, for a period of five years after the expiration of the option period, it may be asked when — what year, month or day — did the defendant have a right to repurchase the premises in question? No tender of reconveyance had been made to him. No intimation on the part of the plaintiff had been given that such tender was to be made. The defendant was, therefore, without power to act. It was not for him to interfere with the laudable and legal purpose of the plaintiff to realize a substantial profit upon the investment which he had made. At the expiration of the option period the plaintiff was engaged, as he had been before, in trafficking with the property for his own benefit, and without having demanded of the defendant that he repurchase the same.

Taylor v. Blair (59 Hun, 347) was an action upon a contract almost identical with the one at bar. On April 4, 1873, one Meyer purchased 500 shares of stock, and the defendants agreed "that, if at the end of one year from this date the said Meyer shall desire to

sell the said shares at the price paid for the same by him, we will purchase the same and pay to him the amount paid by him on the same, with interest." It was held that it was incumbent upon Meyer, in order to sustain an action brought to recover the amount paid for such stock with interest, to prove that on the 4th day of April, 1874, he offered or tendered a transfer of such shares to the parties agreeing to purchase the same. The court said: "That was a condition precedent, according to the terms of the agreement upon which the right to recover this money depended." In the opinion of the late Justice DANIELS, which was concurred in by VAN BRUNT, P. J., and BRADY, J., many authorities are cited in support of the proposition.

In *Page v. Shainwald* (169 N. Y. 246) the effect of a similar contract was considered, the agreement on the part of the defendant in that case being: "I hereby agree, if requested so to do by you, on the first day of January, 1897, within ten days thereafter to pay to you the amount paid by you upon such subscription," etc.

It was held that, as the plaintiff failed to tender his stock and make the request on the day named, he could not recover, although he did so three days after, and notwithstanding the day named in the contract was a legal holiday.

To the same effect is *Hakes v. Peck* (1 Keyes, 505); *M'Nitt v. Clark* (7 Johns. 465).

This is a case where an obligor agrees to do something "at the end of" a certain time, in case the obligee so elects. It is not for a jury to say that such election may be made at a different time than that specified in the contract, or at any time within five years thereafter.

We think the cases referred to in the prevailing opinion have no bearing upon the question in controversy.

Pierson v. Crooks (115 N. Y. 539) was an action to recover under an executory contract for the sale and delivery of goods of a specified quality, and it was simply held that the purchaser had a reasonable time in which to determine whether or not the goods were of such quality. In that case the court said: "It stands upon the most obvious justice and equity that the seller should be apprised promptly if there is any objection and the vendee intends to reject the goods, so that he may retake possession or resell the goods and

save himself as far as practicable from loss. But the vendee has a reasonable time for examination and to give notice, and what is a reasonable time is usually a question of fact and not of law, to be determined by the jury upon all the circumstances, including as well the situation and liability of injury to the vendor from delay, as the convenience and necessities of the vendee."

The case of *Grabfelder v. Vosburgh* (90 App. Div. 307), also referred to in the prevailing opinion, we think has no application to the question involved in this case. There the plaintiff sold a new brand of whisky to the defendant upon the express condition that if the defendant could not sell it — no time being fixed — he would not be required to pay for it, and that the plaintiff would take it back; and it was simply held that it was for the jury to say, under all the circumstances, whether the defendant kept the goods for such length of time as to be deemed to have ratified the sale, or whether he offered to return the same within a reasonable time.

All cases of that class are decided upon the theory that there was an implied contract that the vendee should have a reasonable time for inspection. If the contract of sale, however, provides that the inspection shall be made on or before a certain day, and the goods returned to the vendor if found unsatisfactory, it would not be claimed that a jury might be permitted to say that it was only reasonable that the vendee should have a longer time in which to make such inspection, and thus be relieved from paying for the goods.

We think it should be held that the facts disclosed by the evidence in the case at bar failed to establish a cause of action in plaintiff's favor, as against the defendant, and that the motion for a non-suit should have been granted.

STOVER, J., concurred.

Defendant's exceptions sustained and motion for a new trial granted, with costs to the defendant to abide event.

WILLIAM A. LOOMIS and FRANCES LOOMIS, Respondents, v. JEFFERSON COUNTY PATRONS' FIRE RELIEF ASSOCIATION, Appellant.

Oral agreement by a director of a co-operative fire insurance company that a new policy would be issued on the expiration of an existing one — destruction of the property after the expiration of the existing policy and pending action on the application for the new policy — provision that the policy might be made payable to the mortgagees — the name of the mortgagee need not be stated.

A co-operative fire insurance company issued a policy of insurance upon farm buildings expiring November 24, 1900. The directors of the association were its soliciting agents, and in January, 1900, one of such directors named Babcock informed the insured that the policy had expired. The insured made an application for a new policy and paid a portion of the premium. A new policy was issued, but was canceled, Babcock having learned that the existing policy had not expired.

The insured had, in the meantime, paid the balance of the premium and it was orally agreed between him and Babcock that, upon the expiration of the existing policy, a new policy would be issued; that Babcock would attend to the execution of the new policy and that the premium paid by the insured should be retained by Babcock and applied on the new policy. Both the application and the premium were retained by the insurance company.

November 24, 1900, when the existing policy expired, the insured went to Babcock's home and applied for a renewal of the policy. There was some dispute as to whether the insured signed the application, but it was taken by Babcock and mailed to the office of the insurance company, which received it on the morning of November twenty-seventh. On the same day a portion of the insured property was destroyed by fire. Thereafter the insurance company, without knowledge of the fire, returned the policy to Babcock for the purpose of having it signed by the applicant and of having a mortgagee clause inserted therein.

Babcock was absent from home when the policy arrived, but returned a few days later, when he took the application to the insured and procured his signature thereto and the insertion therein of the name of the mortgagee. The application was then sent to the insurance company and was rejected by it.

In an action brought on the oral agreement, made by Babcock at the time the new policy issued in January, 1900, was canceled, to the effect that a new policy would be issued on the expiration of the existing policy, it appeared that Babcock, as a director, had in his custody blank applications to be signed by applicants for insurance and that his approval of the application was required before the policy was issued; that the by-laws of the insurance company provided: "The president and secretary shall have power to issue policies at any time on property insured by any directors, providing such application meets the requirements of said Acts and these By-laws."

There was nothing in the by-laws of the association prohibiting a director from making an oral agreement for temporary insurance which should be valid until the home officers acted.

Held, that while Babcock did not possess authority to issue, in form, a written policy binding upon the defendant, he did have authority to make a valid agreement on behalf of the defendant to insure the property which was effective until the defendant took definite action on the application;

That, assuming that the home officers might eventually reject the application, Babcock's oral agreement was valid until such rejection;

That the insurance company could not reject the application simply because a loss had occurred;

That a provision in the by-laws that the "policies may at the request of the insured be endorsed * * * payable to mortgagee, as h... interest may appear," did not make it obligatory upon the insured, who stated in the application that the premises were incumbered, to give the name of the mortgagee.

APPEAL by the defendant, the Jefferson County Patrons' Fire Relief Association, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Jefferson on the 19th day of January, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 19th day of January, 1903, denying the defendant's motion for a new trial made upon the minutes.

The plaintiffs are the owners of a farm in the town of Champion in the county of Jefferson and the defendant is a co-operative fire insurance company restricted in its business to the counties of Jefferson and Lewis and incorporated pursuant to chapter 362 of the Laws of 1880, as amended particularly by chapter 573 of the Laws of 1886.

Every applicant for insurance must be a member of one of the local granges of defendant and is liable to the payment of assessments to meet losses and expenses. The plaintiffs had become members of the defendant in 1890 by receiving a policy of insurance upon the buildings on their farm. This policy bearing date November 24, 1890, by its terms expired November 24, 1895, and at its expiration a renewal policy was issued for five years. The soliciting agents of the defendant were its directors and there was a director named Babcock all this time living in the vicinity of the plaintiffs and to whom the applications for these policies were made. In January, 1900, Babcock informed the plaintiff William Loomis,

in whose name the policy was running, that it had expired and a new application was made and a portion of the premium paid, and another policy issued in form like its predecessor but it never was delivered to Loomis. Later Babcock learned that the policy issued in November, 1895, had not yet expired and the one of January was canceled, although this did not occur until several months had elapsed from the date of its issuance, the precise time being in controversy and is unimportant. In any event, when Mr. Loomis learned of it he and Babcock agreed that the premium already paid, and in the meantime he had paid the balance, should be applied in payment of the new policy which it was arranged should be issued November 24, 1900, upon the termination of the existing policy. On that day Mr. Loomis went to the home of the director and applied for a renewal of the policy and an application was filled out by Mr. Babcock and which Loomis says he signed, although that question is in dispute and will be adverted to later. On the same day, which was Saturday, Babcock took the application to Watertown, intending to deliver it to the defendant's office but found it closed. He returned with the application and mailed it to the defendant the succeeding Monday and it was received on Tuesday morning, the twenty-seventh. It was returned to Babcock by the secretary for correction: *First*. To have it signed by the applicant, and, *second*, to have the loss, if any, payable to the mortgagee as his interest may appear. Babcock was absent from home at the time the application arrived and did not return until Saturday. On Sunday he went with the application to the respondents and it was signed by Mr. Loomis and the name of the supposed mortgagee inserted in his stead and the application was left with Loomis to forward to the defendant and the application was subsequently rejected.

Early in the morning of November twenty-seventh and before the return of the application to Babcock by the defendant for correction the barn described in the policy was wholly destroyed by fire and the extent of the liability of the defendant, if liable at all, was stipulated upon the trial. The defendant's secretary testified that when he returned the application he had not learned of the fire. Mr. Loomis wrote to the secretary on the twenty-seventh informing him of the burning of the barn and its contents. Further facts appear in the opinion.

Joseph Atwell, for the appellant.

W. B. Van Allen, for the respondents.

SPRING, J.:

This action was brought on the oral agreement made by Babcock, the director, when he informed Loomis that the policy of January twenty-fourth was ineffective because the preceding policy was still in force. The plaintiff testified that the director said in substance that he would attend to it and this is in effect corroborated by Babcock. The full premium was retained by Babcock for the purpose of meeting the premium on the new policy. The application was not returned to the plaintiffs, but was retained by the defendant. It seems clear that it was expected by the parties that the insurance was to be continued, and if nothing further had been done Loomis had the right to expect the issuance of a new policy upon the termination of the one issued in November, 1895.

Loomis, however, did go to Babcock in the forenoon of the day that the old policy was to run out for the purpose of attending to its renewal. If we assume, as Babcock and his wife testified, that the application was not signed by the applicant we are still of the opinion that the property was insured. That was the intention of the parties. The scheme of insurance was the mutual plan and involved membership in the local grange, the payment of assessments and also a specific premium for the particular policy issued and which was graded according to the amount insured. (By-laws, § 2.)

Babcock, as a director, had in his custody blank applications to be signed by the applicant who came to him for insurance with defendant (§ 5), and it was for him to approve the application before the policy was issued (§ 4). Section 13 provides: "The president and secretary shall have power to issue policies at any time on property insured by any directors, providing such application meets the requirements of said Acts and these By-laws." That is, the director takes the application and makes the contract of insurance, but its formal confirmation by the issuance of a policy rests with the two officers named. There does not seem by the by-laws to be lodged with these officers the unqualified authority to reject an application which has received the sanction of a director. Of course, this could be accomplished in conjunction with that director or by the action of the board of directors.

But assuming that the home officers might eventually reject the application, until this was done the agreement of Babcock was valid and the insured was entitled to the protection intended thereby.

Babcock did not possess the authority to issue in form a written policy binding on the defendant. The written application must be accepted by the defendant before the policy was issued, and thereupon it became valid from its date. The director, however, did have authority to make a valid agreement on behalf of the defendant to insure the property until the defendant took definite action on the application. If a loss occurred in the meantime the defendant must pay. If, upon receipt of the application, it learned that the buildings insured had been destroyed by fire it could not allow that fact alone to induce the rejection of the application.

When the application was received by it on November twenty-seventh, it did not reject it or refuse to issue the policy. It returned it for specific corrections, implying that upon these being made the issuance of the policy would follow and it would be operative from the date of the application. The construction placed upon the agreement by Babcock was obviously one of absolute insurance for he presented the application to Mr. Loomis for his signature and correction five days after the burning of the buildings. This action was significant in that it recognized the existence of the contract of insurance. It would have been a mockery for Babcock to go through the performance of correcting this application and having it resigned if he did not understand that by his acts the defendant had become liable for the loss of this property. He was more than an ordinary soliciting agent. His position as director of the defendant with blank applications in his custody and with the duty to approve the applications invested him with authority as one of the executive officers of the defendant.

Inasmuch as the plan of insurance contemplated a written application it is insisted that no oral contract could be made as this in effect would override the requirement of an application in writing. In answer to this it may be said that there is nothing in the by-laws inhibiting a director from making an agreement for temporary insurance to be valid until the action of the home officers. In *Hicks v. British America Assurance Co.* (162 N. Y. 284) the agent of the defendant said to the applicant for insurance "you are insured from

noon on the 30th day of December, 1893, to noon of December 30th, 1894." The court held this was a binding agreement for insurance embracing within it the provisions of the standard policy. In *Squier v. Hanover Fire Insurance Co.* (162 N. Y. 552) the local agents of the defendant at Jamestown had authority by their certificate of appointment "to countersign, issue and renew policies of insurance." About ten days before the expiration of a subsisting policy issued by the defendant the said agents agreed orally with the husband of the plaintiff and who represented her, that the policy would be renewed at its expiration, and plaintiff was to pay the premium within thirty days and get the policy. The old policy expired December 20, 1894, and the property was destroyed by fire December twenty-ninth, and no new policy had been issued. The plaintiff recovered the amount of the insurance and the Court of Appeals upheld the recovery. In *Van Loan v. Farmers' Mutual Fire Ins. Association* (90 N. Y. 280) the applicant applied to a director for insurance, paying the required sum. The director made the survey and notified the company, but the matter was held in abeyance for the reason that the policy was to be made out in the name of the wife of the applicant and her first name was unknown. A fire occurred in the meantime and the defendant was held liable. These cases are decisive of the present one so far as this aspect of the case is concerned. In fact the situation is far stronger here for the plaintiff, for there was an application in writing prepared in January which was withheld by the defendant and there was at least an attempt honestly made to prepare another and there was no formal rejection of it. In addition to these circumstances are the acts of Babcock, tending strongly to corroborate the position of the plaintiffs.

So far we have assumed that the last purported application was not signed by Loomis. There was proof tending to show he did in fact sign it, but we are free to add that if to uphold the recovery depended on agreeing with the jury on that proposition, we should have some hesitancy in doing so. On the practically undisputed testimony, however, we think the circumstances show an agreement, a plain understanding that the property was insured at the time it was burned.

In each written application Loomis answered the inquiry as to his

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title or interest by the word "deed," implying that he was the sole owner of the property. Loomis and his wife testified that they informed Babcock they owned the farm jointly, which is the fact, and supposed he so stated in the application. The jury have found with the plaintiff on this question, so Babcock, the director, possessed full notice of the ownership of the property.

In the last-attempted application Loomis stated that the premises were incumbered to the extent of \$1,800, but did not give the name of the mortgagee. This form was followed in the preceding applications and no dissent was made by the defendant. By section 13 of the defendant's by-laws it is provided that the "policies may at the request of the insured be endorsed * * * payable to mortgagee, as h. . interest may appear." It is not obligatory, and certainly the failure to do so does not relieve the defendant from liability.

We do not deem it important to discuss the other exceptions urged by the appellant. The real mortgagee assigned her interest in the policy to the plaintiffs.

The judgment and order should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

PAUL HELLINGER and EDMUND R. REYNOLDS, Respondents, v.
ALBERT E. MARSHALL, Appellant.

Contract to furnish cuts representing a hardware and bicycle business — failure to furnish the cuts representing the bicycle business — testimony of the defendant that the bicycle business was important; that he paid for the cuts received by him; that he notified the plaintiffs of the alleged breach of the contract.

In an action brought to recover under a contract, by which the plaintiffs agreed to advertise by cuts the hardware and bicycle business of the defendant, which were entirely distinct, the defendant alleged a breach of contract by the plaintiffs, in that the cuts furnished did not represent his bicycle business.

Held, that it was proper to permit the defendant to testify that the bicycle business constituted the largest share of his business;

That it was also proper to permit the defendant, over the plaintiffs' objection that it was incompetent, immaterial and irrelevant, to testify that he had paid the plaintiffs for the cuts which he had received;

That it was also proper to permit the defendant, over the plaintiffs' objection that it was incompetent, irrelevant and immaterial, to state whether he had notified the plaintiffs that they had broken their contract.

APPEAL by the defendant, Albert E. Marshall, from a judgment of the County Court of Wayne county, entered in the office of the clerk of the county of Wayne on the 22d day of April, 1903, reversing a judgment of a justice of the peace of the town of Lyons, in favor of the said defendant, entered on the 20th day of May, 1902.

C. W. Knapp, for the appellant.

Charles P. Williams, for the respondents.

SPRING, J.:

I think the judgment of the County Court should be reversed, and that of the justice affirmed.

The parties entered into a written agreement by which the plaintiffs were to advertise by cuts the hardware and bicycle business of the defendant. Four cuts were furnished gratuitously by the agent of the plaintiffs as samples. The hardware and bicycle business of the defendant were entirely distinct. Two of the cuts furnished represented the hardware business and two the bicycle business. The plaintiffs in pursuance of the contract commenced to send the cuts and continued to do so. Of these sent, by the stipulation of the parties it is conceded that only one represented the bicycle business of the defendant. After a few months the defendant notified the plaintiffs that he would not receive any more of the cuts because they did not conform to the agreement in that they only advertised the hardware business. The plaintiffs sued to recover the contract price and it was a question of fact for the jury to determine whether or not they were entitled to recover. The defendant was claiming that there was a breach of contract in that the cuts did not represent his bicycle business. The defendant was asked this question on the trial: "What was the largest share of your business in the village of Cazenovia?" This was objected to and the witness was permitted to answer and stated that it was the bicycle business. For this alleged error the County Court has reversed the judgment

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of the Justice's Court in favor of the defendant. We think the evidence was competent. The defendant was seeking to show that the failure to supply cuts of his bicycle business was a material breach of the agreement and for the purpose of establishing that fact it was competent to prove that his bicycle trade was an important feature of his business.

It is contended that there are other errors which justify the reversal although not alluded to by the county judge. Upon the trial the defendant was asked in substance if he had paid the plaintiffs for the cuts received by him under the written contract. This was objected to upon the ground that it was incompetent, immaterial and irrelevant. It was competent, material and relevant to show payment. There was no objection that the question called for a conclusion or that it was leading and, of course, the present respondents are limited to the grounds which they interposed as objections to the question. Again the defendant was asked if he had notified these plaintiffs that they had broken their contract. The same objections were interposed to this question. It was not objected that the notification was in writing or that it was a conclusion.

Considerable space is taken up in the respondents' brief to show that the evidence relating to the breach of the contract was not admissible within the answer. This ground was not included among the objections upon the trial. So far as we are able to discover the case involved a fair question of fact before the jury in the Justice's Court and their conclusion ought not to be disturbed.

The judgment of the County Court is reversed and that of the Justice's Court affirmed, with costs of this appeal and in the County Court to the appellant.

All concurred.

Judgment of County Court reversed, with costs to the appellant, and judgment of the Justice's Court affirmed, with costs in the County Court.

NOTE.—The rest of the cases of this term will be found in the next volume, 93 App. Div.—[REP.

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Frank W. Goreth, as Ancillary Administrator of Thomas Kelher, Deceased, Respondent, v. Jacob R. Shipherd, Appellant.—Order affirmed, with ten dollars costs and disbursements.—Appeal by the defendant, Jacob R. Shipherd, from an order of the Special Term of the Supreme Court, entered in the office of the clerk of the county of Queens on the 25th day of September, 1902, denying the defendant's motion to vacate certain orders theretofore granted in the action, and for stay of the plaintiff's proceedings, and for final judgment in the defendant's favor.—**HIRSCHBERG, P. J.:** The plaintiff's decedent, Thomas Kelher, a non-resident of this State, recovered a judgment against the defendant in the Marine Court of the city of New York in the year 1892. The judgment is uncollected. In September, 1897, an action was commenced against the defendant by the attorneys by whom the judgment was recovered, upon the judgment and in the name of the decedent as plaintiff. Discovering subsequently that Thomas Kelher had died before the commencement of that action, the plaintiff's attorneys duly procured the appointment of the plaintiff as ancillary administrator, and thereupon commenced this action against the defendant upon the judgment, the venue being laid in the county of Queens. It appeared, however, that at the time this action was commenced the ancillary administrator had failed to qualify, and by orders of the court thereafter duly obtained leave was granted for the discontinuance of both the action upon the judgment brought in the name of the decedent and this one which was prematurely brought by the plaintiff; and after qualification by the plaintiff another action was commenced in his behalf in the county of New York, to enforce the defendant's liability upon the judgment. The order granting leave to the plaintiff to discontinue this action appears to have been regarded by his attorneys as a sufficient order of discontinuance, and no other formal order was made or entered. The order appealed from denies the defendant's motion to stay the plaintiff's proceedings in this action and to render final judgment in the defendant's favor herein, and also denies the defendant's motion made at the same time to vacate the orders granting leave to discontinue this action and the one brought upon the judgment in the name of the decedent. Conceding that there were irregularities in the steps by which it was sought to discontinue the plaintiff's first action, viz., the one in which the present motion was made, it is quite apparent that justice requires the affirmance of the order appealed from. I think the action brought upon the judgment in the name of the decedent was wholly void, and whatever doubt may have existed heretofore as to the efficacy of the proceedings by which it was sought to discontinue this action was resolved by the learned justice at Special Term by the granting of a formal order of discontinuance

of such action upon the hearing of the present motion. The defendant's objections disclose the denial of no substantial right; costs appear to have been paid to and retained by his attorney on the granting of each precedent motion; and as the course finally adopted leaves but a single action, viz., the one in New York county, commenced upon the verge of the period of limitation, in which action the parties proper to the proceeding may determine the controversy upon the merits without prejudice to such rights upon either side, the order should be affirmed. All concurred.

Zachariah T. Allison, Respondent, v. The Long Clove Trap Rock Company, Appellant.—Judgment and order unanimously affirmed, with costs.—Appeal by the defendant from a judgment of the Supreme Court, entered in the office of the clerk of Rockland county on the 17th day of November, 1902, and also from an order entered in the same office, bearing date the 24th day of February, 1903, denying the defendant's motion for a new trial.—

PER CURIAM: The facts of this case as they were made to appear upon the first trial are fully set forth in the opinion of Mr. Justice Hirschberg, reversing the judgment originally entered upon a dismissal of the complaint. (*Allison v. Long Clove Trap Rock Co.*, 75 App. Div. 267.) The case as presented in the appeal book now before us is stronger for the plaintiff than it was then. A brakeman named Flynn, who was an important witness of the accident, was not called upon the first trial. His testimony appears in the present record, and the account which he gives of the manner in which the accident occurred indicates that it was because of the failure of the brake to work. This additional evidence makes it clearer than ever that there was a question for the jury, and we cannot now hold otherwise without reversing our previous decision. We have examined the various rulings of the learned trial judge to which the appellant has called our attention, and find none which involves any error. While some of the responses to the defendant's requests to charge might be subject to criticism if they stood alone and without qualification, they seem to us to be correct in every instance, when considered in connection with the instructions to the jury as a whole. The judgment and order appealed from should be affirmed.

The People of the State of New York ex rel. David Sandman, Respondent, v. Henry S. Brush, as County Treasurer of Suffolk County, and Patrick W. Cullinan, as State Commissioner of Excise, Appellants.—Order affirmed, with ten dollars costs and disbursements, on the opinion of Mr. Justice Wilcott M. Smith at Special Term. (Reported in 41 Misc. Rep. 56.) All concurred.

The People of the State of New York ex rel. Frank G. Yetter and George V. Moore, Comprising the Firm of Yetter & Moore, Respondents, v. Henry S. Brush, as County

- Treasurer of Suffolk County, and Patrick W. Cullinan, as State Commissioner of Excise, Appellants.—Order affirmed, with ten dollars costs and disbursements, on the opinion of Mr. Justice Wilmot M. Smith at Special Term. (Reported in 41 Misc. Rep. 56.) All concurred.
- Alice L. Hawes, as Committee of the Person and Estate of Mary Crosbie, an Incompetent Person, Appellant, v. Alfred Carr, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Edward Seemann, Respondent, v. Central Brewing Company, Appellant.—The court desire to see counsel in this case.
- Leonard Gustavson, Respondent, v. John A. Johnson, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.
- Ellen C. Osborn, Respondent, v. Howard J. M. Cardeza and Others, Appellants.—Judgment affirmed, with costs. No opinion. All concurred.
- Charles H. Cole, Respondent, v. The Preferred Accident Insurance Company of New York, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred.
- Alexander White, Respondent, v. New York Dock Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.
- Walter S. Smith, Respondent, v. Kate L. Baldwin and Others, as Administrators, etc., of Frederick A. Munson, Deceased, Appellants.—Judgment affirmed, with costs. No opinion. All concurred.
- Sarah Ward, Respondent, v. Supreme Council, American Legion of Honor, Appellant.—Judgment affirmed, with costs, on the authority of *Simon v. Supreme Council* (91 App. Div. 890). All concurred.
- George E. Truman, Respondent, v. Philip Smith, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Jacob Hirschberg, Appellant, v. Charles Horowitz, Respondent.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- George W. Ray, Appellant, v. James Mahoney, Respondent.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- James S. Milner, Respondent, v. Peter Herter, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Charles Spahn, Respondent, v. Interurban Street Railway Company, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- William Fitzpatrick, Respondent, v. Patrick Fox and Catherine Fox, Appellants.—Judgment affirmed, with costs. No opinion. All concurred.
- Maria Brosi, Respondent, v. Metropolitan Street Railway Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.
- John J. Wood, Respondent, v. Susie V. Whelen, Appellant.—Judgment affirmed, with costs. No opinion. All concurred.
- Genie H. Campbell (Substituted), Respondent, Appellant, v. Albert Friedlander and Marcus Marks, Appellants, Respondents.—Judgment affirmed, without costs. No opinion. All concurred.
- Martha Hutchins, Respondent, v. Pennsylvania Railroad Company, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred.
- In the Matter of the Application of D. Lewis Downs to Lay Out a Highway in the Town of Riverhead, County of Suffolk, N. Y., and to Assess the Damages Therefor.—Motion to confirm the order of the County Court of Suffolk county granted and order signed.
- Michael P. Meisen, Respondent, v. Isaac Rothfeld, Appellant.—Motion for stay of proceedings pending appeal granted.
- Louisa Schlotterer, an Infant, etc., Respondent, v. Brooklyn and New York Ferry Company, Appellant.—Motion to amend order denied.
- Alice M. Drew, Respondent, v. Hamilton H. Salmon and Another, Appellants.—Motion to resettle order granted.
- In the Matter of the Application of the County Trust Company for an Order Designating it as a Deposit Bank for Funds and Moneys Paid into Court.—Order granted referring the application to John M. Digney, Esq., to examine and report.
- In the Matter of the Application of Henry M. Blackmer for Admission to the Bar.—Application granted.
- In the Matter of the Application of Francis Fitch for Admission to the Bar.—Application granted.
- In the Matter of the Application of John Gilpatrick Smith for Admission to the Bar.—Application granted.
- In the Matter of the Application of the Brooklyn Bar Association to Punish Benjamin E. Valentine, an Attorney.—After the preliminary examination of the verified petition which has been presented to the Appellate Division in this matter, the prescribed method of procedure in cases of this kind requires the issuance of a formal order directing the accused attorney to show cause why he should not be suspended from practice or removed from office. (*Anonymous*, 22 Wend. 656; *Matter of Percy*, 35 N. Y. 651; *Matter of Brewster*, 13 Hun, 109; *Matter of Eldridge*, 88 N. Y. 161.) That course will be pursued in the present case, and if, upon the return of the order to show cause, the attorney makes the same denials which he has already made informally, the matter will be sent to a referee to take testimony in accordance with the practice approved by the Court of Appeals in the *Eldridge* case.
- In the Matter of the Application of the Brooklyn Bar Association to Punish Eugene R. Hayne, an Attorney.—The same disposition will be made of this matter as directed in *Matter of Brooklyn Bar Assn., In re Valentine* (ante, p. 612).
- In the Matter of the Application of the Brooklyn Bar Association to Punish James A. Murtha, Jr., an Attorney.—A formal order to show cause will be granted in this matter, as directed in *Matter of Brooklyn Bar Assn., In re Valentine* (ante, p. 612). In consequence of the absence of the attorney the order will provide for substituted service of the papers upon him.
- In the Matter of the Brooklyn Bar Association to Punish Albert M. Fragner, an Attorney.—An order to show cause will be granted in this case, to be served according to the practice already indicated by this court as proper in other cases of the same character.
- Jennie Quinlan, as Administratrix, etc., Appellant, v. The New York, New Haven and Hartford Railroad Company, Respondent.—Motion denied, with ten dollars costs.
- Mary C. Grifhahn, as Administratrix, etc., Respondent, v. Bernard Kreizer and Others, Appellants.—Motion granted unless the appellant file, within ten days, an undertaking accurately describing the judgment and approved by the presiding justice.
- In the Matter of the Application and Petition of Michael T. Daly, as Commissioner of Public Works of the City of New York,

- under Chapter 199 of the Laws of 1893, to Acquire Certain Real Estate, etc.—Motion denied.
- George Balsam, an Infant, by Philip Balsam, his Guardian ad Litem, Appellant, v. Palm Manufacturing Company and Others, Respondents.—Order affirmed by default, with ten dollars costs and disbursements. All concurred.
- Thomas McNally, Appellant, v. The Brooklyn Heights Railroad Company, Respondent.—Judgment and order unanimously affirmed, with costs. No opinion.
- Joshua W. Barnum, Respondent, v. John T. Williams, Appellant. (Action No. 2.)—Appeal dismissed, with ten dollars costs and disbursements, on the authority of *Barnum v. Williams*, No. 1 (91 App. Div. 464). All concurred.
- Christopher Givens, Respondent, v. The Brooklyn Heights Railroad Company, Appellant.—Order setting aside verdict and granting new trial affirmed, with costs of this appeal to abide the event of the action. No opinion. All concurred.
- Lulu E. Moseman, an Infant, by John H. Miner, her Guardian ad Litem, Respondent, v. Merritt Wright Moseman, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- The People of the State of New York ex rel. Franz Bach, Respondent, v. The New York Catholic Protectors, Appellant.—Order reversed on the argument and proceedings remitted to the Special Term for further disposition. All concurred.
- Durfee C. Chase, Respondent, v. Katharine E. Drake, Appellant.—Order reversed on the argument, with ten dollars costs and disbursements, on the authority of *Jones v. Butler* (83 Hun, 91) and *Garrett v. Wood*, No. 2 (61 App. Div. 234), and motion granted, with costs, and the clerk of the county of Kings is directed to retax the costs by striking out the item of fifteen dollars for proceedings before the notice of trial. All concurred.
- Annie Collier, Respondent, v. Robert Collier, Appellant.—Order affirmed on the argument, with ten dollars costs and disbursements. All concurred.
- Dionysius Herrman and Elizabeth Herrman, his Wife, Respondents, v. Albert Scherrer and Mary Scherrer, his Wife, Appellants.—Order affirmed on the argument, with ten dollars costs and disbursements. All concurred.
- Alice L. Hawes, as Committee of the Person and Estate of Mary Crosbie, an Incompetent Person, Respondent, v. Alfred Carr, Appellant.—Appeal dismissed, with ten dollars costs and disbursements. No opinion. All concurred.
- Francis P. Martin, Respondent, v. Ambrose A. Gavigan Company and the Dominican Convent of Our Lady of the Rosary, Appellants.—Reargument ordered and case set down for March 14, 1904.
- Fannie C. Ryer, as Administratrix, etc., of Benjamin Ryer, Deceased, Respondent, v. The Prudential Insurance Company of America, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- The People of the State of New York ex rel. James Campbell, Appellant, v. John N. Partridge, as Police Commissioner of the City of New York, Respondent.—Motion granted.
- Lillian Romaine, as Administratrix, etc., Appellant, v. The New York, New Haven and Hartford Railroad Company, Respondent.—Motion for leave to appeal to the Court of Appeals granted. It is not necessary, upon an appeal from such a judgment as this, to certify any special question, but the certificate should be made in the form prescribed by section 191, subdivision 2, Code of Civil Procedure.
- Frederick Bryant, Respondent, v. John Greenough, as Receiver of the New York and Staten Island Electric Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.
- Josiah Taylor, Respondent, v. J. Walter McClymonds, as Executor, etc., of Louis K. McClymonds, Deceased, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.
- Elizabeth D. Miller, Appellant, v. New York and North Shore Railway Company, Respondent.—Judgment affirmed, with costs. No opinion. All concurred.
- George Wallace, Appellant, v. William H. Jones and Others, Respondents.—Judgment affirmed, with costs. No opinion. All concurred.
- Sidney C. Chambers, Respondent, v. David Webster, Appellant, Impleaded with Henry A. Seymour and Frederick W. Johnson.—Judgment and order affirmed, with costs. No opinion. All concurred.
- James Coote, as Administrator, etc., of Ann Coote (Formerly Ann Gaffney), Deceased, Appellant, v. The Williamsburg Savings Bank and William A. Brown, as Administrator, etc., of Margaret Brown, Deceased, Respondents.—Judgment affirmed, with costs. No opinion. All concurred.
- Edward Watkins and Others, Respondents, v. William Brown, Appellant.—Judgment of the Municipal Court affirmed by consent, without costs. All concurred.
- The State Board of Pharmacy, Respondent, v. Walter A. Runyon and Charles A. Cannon, Appellants.—Judgment of the Municipal Court affirmed by default, with costs. All concurred.
- Peter Raben, Respondent, v. Karl Nohe, Appellant.—Judgment of the Municipal Court affirmed by consent, without costs. All concurred.
- In the Matter of the Application of William F. Hurley for Admission to the Bar.—Application granted.
- In the Matter of the Application of James H. Griffin for Admission to the Bar.—Application granted.
- Louisa Schlotterer, an Infant, etc., Respondent, v. Brooklyn and New York Ferry Company, Appellant.—Motion denied.
- Mary C. Grifhahn, as Administratrix, etc., Respondent, v. Bernard Kreizer and Others, Appellants.—Undertaking approved and filed.
- Patrick Clark, Respondent, v. Brooklyn Heights Railroad Company, Appellant.—Motion denied.
- The Southampton Electric Light Company, Appellant, v. Willis D. Van Brunt, President, and Others, Trustees, etc., Respondents.—Appeal dismissed, with costs, on the ground that the printed appeal papers are insufficient.
- Gisela Byck, Respondent, v. Max Rosenstock and Edward Cohn, Doing Business under the Firm Name and Style of Rosenstock & Cohn, Appellants.—Motion denied, upon condition that the appeal papers be perfected so that the case may be placed upon the calendar for argument at the next term of this court.
- Lizzie Lyons, Respondent, v. Interurban Street Railway Company, Appellant.—Motion denied.
- The People of the State of New York ex rel. Samuel H. Graham, Relator, v. Edwin F. Studwell, as Supervisor, and Others, Composing the Town Board of the Town of Rye,

- Appellants.—Motion granted and order re-settled and signed.
- Margaret Doyle, Respondent, v. W. L. Douglas Shoe Company, Appellant.
- Margaret Doyle, Appellant, v. W. L. Douglas Shoe Company, Respondent.—Interlocutory judgment modified by inserting provision therein allowing plaintiff costs of the demurrer as a condition for permitting defendant to answer, and as so modified affirmed, with costs of both appeals to the plaintiff, on the authority of *Tallman v. Bernhard* (75 Hun, 80) and *Harmon v. Vanderbilt Hotel Co.* (79 id. 392; aff'd, 143 N. Y. 665).—All concurred.
- Thomas F. Fitzhugh Lee, Respondent, v. Cyrus V. Washburn and George W. Sickels, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Elizabeth A. Clark, Respondent, v. Margaret Brett, Appellant.—Order affirmed by default, with ten dollars costs and disbursements. All concurred.
- Emma P. Sawtell, Appellant, v. Agnes E. De Monde, Respondent.—Order affirmed by default, with ten dollars costs and disbursements. All concurred.
- Hannah G. I. Pearsall, an Infant, by Katherine Smith, her Guardian ad Litem, Respondent, v. Annie E. Rosebrook and Others, Defendants; Adah P. Vernam, Appellant.—Appeal dismissed, without costs. All concurred.
- In the Matter of the Application of James M. Thomas for Admission to the Bar.—Application granted.
- John Brunner, as Receiver, etc., of James M. Connelly, Judgment Creditor, Respondent, v. Cook & Bernheimer Company, Appellant, and Another, Respondent.—Motion denied.
- Matthew Mulligan, Respondent, v. Metropolitan Street Railway Company, Appellant.—Motion denied.
- In the Matter of the Application of Josiah J. White, Guardian of the Person of Frederic Hall White, an Infant, etc., Respondent, for the Payment of Funds by The Long Island Loan and Trust Company, as Guardian of the Property of Said Infant, Appellant, for the Support and Maintenance of Said Frederic Hall White, etc.—Order affirmed on argument, with ten dollars costs and disbursements. All concurred.
- In the Matter of the Application of Josiah J. White, Guardian of the Person of Frederic Hall White, an Infant, Respondent, to Compel an Accounting of The Long Island Loan and Trust Company, Guardian of the Property of Said Infant, Appellant.—Appeal dismissed, with ten dollars costs and disbursements. No opinion. All concurred.
- Michael P. Meisen, Respondent, v. Isaac Rothfeld, Appellant.—Order affirmed on argument, with ten dollars costs and disbursements. All concurred.
- Eliza Fairweather, Respondent, v. Catherine Hall Burling, Appellant.—Order affirmed on argument, with ten dollars costs and disbursements. All concurred.
- Ida L. McDonald, Respondent, v. Holbrook, Cabot & Daly Contracting Company, Appellant.—Appeal dismissed on argument, with ten dollars costs and disbursements. All concurred.
- Frederick H. Schomburg and Henry E. A. Wolff, Copartners, etc., Respondents, v. Max Cohen, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Della L. Prince, Appellant, v. Harris Alter, Respondent.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Arnold Sampter, Respondent, v. Gustaf A. Edelsvard and Others, Defendants, Impleaded with De Witt Smith, Appellant.—Judgment so far as appealed from affirmed, with costs. No opinion. All concurred.
- G. De Witt Clocke, Respondent, v. R. Anna Purdy, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred.
- George K. Light, Appellant, v. Etta A. Light, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Fannie E. Lilly, Respondent, v. The Preferred Accident Insurance Company of New York, Appellant.—Judgment affirmed on the law and facts, with costs. No opinion. All concurred.
- Cynthia Wayne, Appellant, v. Mary Gale, Respondent.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Charles B. Barker, Respondent, v. Eva M. Barker, Appellant.—Order affirmed, with ten dollars costs and disbursements on the authority of *Quinn v. Brooklyn Heights R. R. Co.* (88 App. Div. 87). All concurred.
- In the Matter of the Voluntary Dissolution of Malcolm Brewing Company, Henry Doscher, Creditor, Appellant; C. Henry Offerman and Albert H. F. Seeger, as Receivers of the Malcolm Brewing Company, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Ralph W. Redding, Respondent, v. The American Distributing Company and Edmund H. Garrison, Appellants, Impleaded with The Eastern General Bonded Warehouse Company and Others, Defendants.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- William Lindner, Appellant, v. The Brooklyn Heights Railroad Company, Respondent.—Judgment of the Municipal Court reversed on argument, with costs to the appellant, and action discontinued, the costs of the appeal to be offset against costs of discontinuance to be taxed. All concurred.
- James L. Kent, as Administrator, etc., of John E. Kent, Deceased, Appellant, v. The New York, New Haven and Hartford Railroad Company, Respondent.—Judgment reversed and new trial granted, costs to abide the event, on authority of *Strauss v. New York, New Haven & Hartford R. R. Co.* (91 App. Div. 583). All concurred.
- William H. Lambert, Respondent, v. Metropolitan Street Railway Company, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred, except Woodward, J., dissenting.
- Charles J. Edwards, Respondent, v. Clara L. Fisher, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Catharine O'Meara, as Administratrix, etc., of John A. O'Meara, Deceased, Respondent, v. The Brooklyn Heights Railroad Company, Appellant.—Judgment and order reversed and new trial granted, costs to abide the event, because of error in refusal to charge request appearing at folio 205 of the printed case. All concurred.
- The People of the State of New York ex rel. Robert Lefferts, Respondent, v. George B. McClellan and Others, Composing the Board of Estimate and Apportionment of the City of New York, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred, except Bartlett and Jenks, JJ., who dissented upon the ground that it does not appear that the resolution of the local board of Flatbush has

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ever been presented to the existing board of estimate and apportionment; but being of the opinion that if it had been so presented the order below would have been proper.

Jacob Levin, an Infant, by Marcus Levin, his Guardian ad Litem, Respondent, v. Allison

Dodd and Others, Copartners, Doing Business under the Name and Style of Hudson Coal Company, Appellants, Impleaded with George F. Hills, Defendant.—Judgment and order unanimously affirmed, with costs. No opinion.

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John J. Scott, Respondent, v. The International Paper Company, Appellant.—Judgment and order reversed and new trial granted, with costs to appellant to abide event.—Appeal by defendant from a judgment entered in the clerk's office of Washington county on the 5th day of March, 1903, and from an order denying a motion for a new trial, entered in said clerk's office on the 4th day of March, 1903. The action is brought to recover damages for the defendant's failure to use reasonable diligence in unloading the plaintiff's cargo, shipped to the defendant at Fort Edward, N. Y. Upon the 24th day of November, 1901, the plaintiff's boat, loaded with pulp wood for the defendant, reached Fort Edward. Upon the morning of the twenty-fifth the plaintiff reported to the defendant that he was there ready to unload. Upon the twenty-eighth of November the canal was frozen solid, and no boats were thereafter unloaded. The plaintiff's claim is, that in violation of his rights, two scows, which arrived after the plaintiff, were permitted to be unloaded before the plaintiff, and that by reason thereof his boat was frozen in with its load on. He recovered a verdict of fifty-three dollars and fifty cents for damages sustained under these circumstances, and from the judgment the defendant appeals.—

SUTTER, J.: It is not claimed that the defendant is responsible for any damage caused by the freezing of the canal alone. If the plaintiff's boat had been unloaded in its regular turn, it would still have been frozen in before reaching any other destination. The only damage which the plaintiff can here recover is the damage which the plaintiff suffered by reason of the fact of the boat being frozen in with the load on. It appears that it was universally necessary to have boats calked in the spring to prevent leakage, whether they be frozen in with the load on or free from the load. The only evidence of damage here is that it cost seven dollars and fifty cents to have the boat calked at Fort Edward in the spring, and that it cost about forty-one dollars to have certain repairs made at Whitehall. There is no evidence in the case that those repairs made at Whitehall were repairs made necessary by the freezing in of the boat with the load on, and there is no evidence that the calking which was done at Fort Edward was any more than would have been required had the boat been frozen in unloaded. Without such proof the plaintiff would seem to have failed to have established any damage for which the defendant here is legally liable. I am unable to see how the evidence as to the rental value of canal boats in the winter time in New York city could be of any assistance to the jury in ascertaining the damage properly chargeable to the defendant. For failure of proof, therefore, of damages for the claimed negligent act of the defendant the plaintiff must be deemed to have failed to have established his cause of action, and the judgment and order must be reversed. All concurred.

The Albany County Bank, Respondent, v. The People's Co-operative Ice Company, Appellant, Impleaded with Edward McCabe, Defendant. (Action No. 2).—Judgment and order reversed and new trial granted, with costs to appellant to abide event, on opinion in *Albany County Bank v. People's Ice Co.*, No. 1 (*ante*, p. 47). All concurred, except Chester, J., dissenting.

William A. Gray and Others, Respondents, v. York State Telephone Company, Appellant, Impleaded with the Eastern Electrical Construction Company. (Memorandum).—Judgment affirmed on opinion in *Gray v. York State Telephone Co.* One bill of costs only allowed in this case and in the case of *Gray v. York State Telephone Co.* (*ante*, p. 89).—Judgment unanimously affirmed, without costs, on opinion in *Gray v. York State Telephone Co.* (*ante*, p. 89).

John Bellegarde v. Union Bag and Paper Company.—Motion for leave to go to Court of Appeals granted.

Joseph B. Besant, Appellant, v. The Glens Falls Insurance Company, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred, except Houghton, J., dissenting.

William H. Barnard, Appellant, v. Austin S. Bump and Frank S. Bump, Respondents.—Judgment affirmed, with costs. No opinion. All concurred.

Alfred O. Dunk v. Eliza Dunk, as Executrix, etc., of Alfred Dunk, Deceased.—Motion granted, and case set down for March ninth for argument.

Mary L. Decker, Respondent, v. Hiram Kells, Individually and as Guardian of the Person and Estate of Mary L. Decker, Appellant.—Judgment unanimously affirmed, with costs. No opinion.

Jennie Francis, Respondent, v. Edmund Albright, Appellant.—Judgment affirmed, with costs. No opinion. All concurred.

A. E. Henry and Elmer E. Stanton, Respondents, v. Elizabeth Heydorn and Rebecca Heydorn Bulson, Appellants.—Order unanimously affirmed, with ten dollars costs and disbursements. No opinion.

William H. Knibbs, Appellant, v. Jennie Mosher Eggers and Others, Respondents, and Bertha Knibbs, Defendant.—Judgment unanimously affirmed, with costs. No opinion.

In the Matter of the Application of the Fidelity and Deposit Company of Maryland, Appellant, for Leave to Commence an Action against George H. Stevens, as Committee of the Person and Estate of Nancy C. Warner, an Incompetent, Respondent.—Motion granted.

Flora A. Miller, as Administratrix, etc., of Elmore H. Miller, Deceased, Appellant, v. The Lehigh Valley Railroad Company, Respondent.—Judgment and order unanimously affirmed, with costs. No opinion.

Royal P. Mead, Appellant, v. Jonathan M. Coolidge and Louis M. Brown, as Executors and Trustees of the Last Will and Testament of George W. Lee, Deceased, and as Executors, etc., of James Lee, Deceased, and

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- Others, Respondents.—Judgment unanimously affirmed, with costs. No opinion.
- Della Moore, Respondent, v. George H. Fuller, Appellant.—Judgment affirmed, with costs. No opinion. All concurred.
- Frederick W. Mersereau, Appellant, v. Diana Camp, Individually and as Surviving Executrix, etc., of George W. Mersereau, Deceased, Respondent, Impleaded with Ida Bell Mersereau.—Judgment unanimously affirmed, with costs. No opinion.
- Elizabeth Niles, Respondent, v. Hawley Miller, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Payne Company, Appellant, v. Richard W. Pratt, Respondent.—Judgment unanimously affirmed, with costs. No opinion.
- The People of the State of New York ex rel. The New York Central and Hudson River Railroad Company v. The Board of Railroad Commissioners of the State of New York and Ashley W. Cole and Others, Being the Members Thereof, and Monroe County Electric Belt Line Company.—Determination unanimously confirmed, with fifty dollars costs and disbursements. No opinion.
- Benjamin C. Riley v. The Village of Ballston Spa.—Motion granted.
- Myron J. Randall, Appellant, v. The Delaware, Lackawanna and Western Railroad Company, Respondent.—Judgment and order unanimously affirmed, with costs. No opinion. Houghton, J., not sitting.
- Joseph B. Talbott, Respondent, v. Russell Shear, Appellant.—Motion denied upon appellant paying defendant, within ten days from the service of this order, ten dollars costs of this motion and ten dollars term fee. In case of failure to pay the same motion granted, with ten dollars costs.
- Madison B. Tripp, Respondent, v. David S. Booth, Appellant.—Judgment affirmed, with costs. No opinion. All concurred.
- Seymour C. Armstrong, Respondent, v. Mary A. Loveland and Hollis Loveland, Appellants, Impleaded with Others.—Order affirmed, without costs. No opinion. All concurred.
- Clarissa Weatherwax Conkling, Respondent, v. John T. Weatherwax, Defendant, Hannah M. Hidley, Appellant; Emily A. Tompkins, Respondent, and Others, Defendants.—Motion denied.
- Delina Girard, as Administratrix, etc. v. International Pulp Company.—Motion denied.
- Herbert T. Jennings, as Receiver of the Oneonta, Cooperstown and Richfield Springs Railway Company, Respondent, v. Morton C. Nichols and Others, Appellants.—Appeal dismissed on stipulation, without costs.
- In the Matter of the Charges against Alonzo A. Burby, an Attorney of the Supreme Court of the State of New York.—Report of referee confirmed, and said Alonzo A. Burby is suspended from practice as an attorney and counselor at law for the period of two years.
- In the Matter of the Application of George H. Morrison to Be Restored to Practice as an Attorney and Counselor at Law under Section 87 of the Code of Civil Procedure.—Motion denied. Chester, J., dissenting.
- Julian Phetteplace v. Smith Lane.—Motion granted, without costs.
- Town of Palatine and Others v. Water Supply Company and Others.—Motion granted.
- Jabes Clews, as Administrator of William J. Clews, Deceased, v. The Union Bag and Paper Company.—Motion denied.

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- The Engineer Company, Appellant, v. Jacques Senn, Respondent. (Action No. 2).—Order reversed and motion granted to the extent stated in opinion, without costs of appeal.—Appeal from an order denying a motion for a bill of particulars.
- PER CURIAM: The plaintiff is entitled to the particulars of the demand contained in the 8th clause of the answer, stating the persons employed by the defendant to do the work therein alleged and the necessary materials procured by the defendant, which are alleged to amount to the sum of \$1,062.35. The plaintiff can have no knowledge of persons employed by the defendant, or the materials procured by him in the performance of the plaintiff's obligations, and to that extent the motion should have been granted. In other respects we think the application was properly denied. The order should be reversed and the defendant required to furnish a bill of particulars, as above indicated, without costs of this appeal. Present—Van Brunt, P. J., Patterson, Ingraham, Hatch and Laughlin, JJ.
- Charles R. Ross, Respondent, v. Bayer-Gardner-Himes Company, Appellant.—Order modified as directed in memorandum, and as modified affirmed, without costs.—Appeal from an order of the Special Term granting the plaintiff's motion for leave to amend the complaint.
- PER CURIAM: The order should be modified by requiring the plaintiff as a condition for the service of the amended complaint to pay to the defendant all costs in the action, except a trial fee for the trial at which a juror was withdrawn, the court having imposed the payment of such trial fee upon the plaintiff as a condition for allowing the withdrawal of the juror, and as thus modified the order should be affirmed, without costs of this appeal. Present—Van Brunt, P. J., Patterson, Ingraham, Hatch and Laughlin, JJ.
- John Wanamaker and Others, Respondents, v. Robert H. Megraw, Appellant.—Judgment and order reversed, new trial ordered, costs to appellant to abide event.—Appeal from a judgment entered upon a verdict directed by the court, and from an order denying a motion for a new trial.
- PATTERSON, J.: This action was brought to recover a sum of money which the plaintiffs claim they paid to or for the use of the defendant. There is no dispute as to the validity of that claim; but the defendant set up in his answer a counterclaim arising upon a contract alleged to have been made with one Sidney W. Rice, an agent or representative of the plaintiffs. It was a contract of employment for one year, and the defendant alleges that by its terms he was to be paid a salary of \$5,000; "four thousand dollars to be drawn during said year and one thousand dollars at the end of said year, provided that the defendant remain with the plaintiffs during the whole of said term and faithfully perform his duties." This alleged contract was made in June, 1899. Rice was an employee of the plaintiffs and had or was to have charge as manager of the dress-

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goods department of a store in the city of Philadelphia of which they were the proprietors. It appears in evidence that in May, 1899, one of the plaintiffs engaged Rice to be a buyer and seller of merchandise, to employ help and look after the general conduct of the business of his department. According to Rice's testimony, which seems to be confirmed, "the arrangement was made to come on July 1st, following." On the 14th of June, 1899, Rice had a conversation with the defendant in Chicago and told him of the arrangement which he (Rice) had made to take up the department as manager and that he would like to employ the defendant as an assistant; and he (Rice) agreed to get for the defendant a drawing account of \$4,000, and if he stayed with and did his business as he should do it and did it well, he (Rice) would see to it that the defendant got another thousand dollars at the end of the year. It is shown that between May and the 1st of July, 1899, Rice had no communication with either of the plaintiffs and that he did not see the defendant again until they met in Philadelphia about July first. Rice did not then inform either of the plaintiffs that any other contract had been made with Megraw than to pay \$4,000 a year. Nothing was said about the additional thousand dollars to be paid at the end of the year; but Megraw entered upon the employment, remained for a year; and drew from the plaintiffs a salary of \$4,000. It is not disputed that he remained all the year and faithfully performed all his duties. No other contract of employment of the defendant was ever made than the one made with Rice. The defendant entered upon his service to the plaintiffs under that agreement and there is no doubt that his services were satisfactory. At the conclusion of the trial the court dismissed the counterclaim and directed a verdict for the amount claimed by the plaintiffs. In dismissing the counterclaim, the court held that the arrangement between Rice and the defendant was made before the agency of Rice became effective and that it further appeared from the evidence that the arrangement referred to was merely a tentative one; and for these reasons, among others not stated, the motion to dismiss the counterclaim was granted. The arrangement was an absolute one. It was to pay \$4,000 absolutely for the year's service, and if the defendant remained during the year and performed his services faithfully, he was to receive an additional \$1,000. The only question in the case is as to the authority of Rice in June, 1899, to make the contract for this additional \$1,000. The defendant entered into the employment and service of the plaintiffs on the first of July, and satisfactorily performed the duties required of him during the year; and that was done under no other arrangement than that entered into between Rice and the defendant in June. The court evidently held upon the evidence presented that although Rice made the contract for \$5,000 with the defendant, he had no authority to do so in June, 1899, because Rice's own employment did not begin until July first, and that if there were a ratification of a contract by the subsequent acceptance of the defendant's services by the plaintiffs, it would only extend to so much of the contract as was disclosed to the plaintiffs, namely, an agreement to pay the defendant the sum of \$4,000 a year, without reference to the additional \$1,000. It seems to us from the evidence that although Rice's actual service to the plaintiffs was not to begin until July 1, 1899, yet he

had authority to arrange for the conduct of the business of the department of which he was to take charge; and that authority was recognized by the acceptance of Megraw as one of the employees in that department. But the case does not depend upon ratification. Rice was employed as a manager of a department and his duties in connection therewith were to begin on the first of July. He had the ostensible authority to arrange for that department so that it would become effective and business could be done in it on the first of July, nothing appearing in the evidence to the contrary. Rice testifies that he was authorized to hire help. He says that in a conversation with Mr. Thomas Wanamaker in the month of May, 1899, with respect to his taking charge of the department, "I told him that I would come there and do it under certain conditions; the conditions were I should be buyer of merchandise, and the seller of merchandise in those departments, have the employment of their help and look after the general conduct of the business. I mentioned all these things at that time." In dismissing the counterclaim, the learned court below apparently relied upon the case of *Rathbun v. Snow* (128 N. Y. 843) in which it was held that the mere appointment of an agent by words *in presentis*, but having reference to a business to be entered upon at some future day, does not confer upon such agent authority in the interim to bind the principal. That was a case in which the agency was not absolute, but according to the intention of both of the parties to the contract was provisional, in the sense that it was not to commence until a certain time and after certain things had been done. But here, according to the testimony of Rice, if it is to be believed, power to employ assistants was given him and there is nothing shown from which it could be inferred that that power was not to be exercised until after the first of July. It seems to us, that in this case the authority was given to Rice, according to his testimony, to have the department organized so that the business could be carried on from the first of July, which was the very day upon which the defendant entered into the employment of the plaintiffs and was recognized as their employee under a contract which had been made with Rice and under no other arrangement. The judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event. O'Brien and McLaughlin, J.J., concurred; Van Brunt, P. J., and Ingraham, J., concurred in result.

VAN BRUNT, P. J. (concurring): I concur in the result of Mr. Justice Patterson's opinion. I do not think that Rice had any power to make any contract with Megraw prior to the first of July, but he having agreed with Megraw as to the terms of an employment to begin on the first of July, and he (Megraw) having as the result of such agreement gone into the employment on that date and, such employment being accepted by Rice and Megraw, having continued in such employment during the year, the necessary implication arises that the terms of such employment on July first were those which had been agreed upon between Rice and Megraw, although at the time when the original agreement was entered into Rice had no power to make the contract of employment. An enforceable contract of employment was made on the first day of July and it referred back for its terms to the agreement previously made. *The Jennie Clarkson Home for Children, Respondent, v. Missouri, Kansas and Texas*

Railway Company, Appellant, Respondent, and Robert Gibson, as General Partner of the Limited Partnership of H. Knickerbacker & Co., Appellant.—Judgment affirmed, with costs.—Appeal from a judgment entered upon the decision of the court at Special Term.—

INGRAHAM, J.: The questions presented upon this appeal are the same as those determined in the case of *Clarkson Home v. Chesapeake & Ohio R. Co.* (ante, p. 491), and for the reasons stated in that case the judgment appealed from should be modified by requiring the Missouri, Kansas and Texas Railway Company to restore to the plaintiff the bonds which it has illegally transferred, or in default of the delivery of such bonds to the plaintiff, the plaintiff should have judgment for the value of the bonds as found by the court, with interest, and that the defendant the Missouri, Kansas and Texas Railway Company is entitled to judgment against the defendant Gibson for the amount that it is required to pay to the plaintiff as the value of the bonds, with interest thereon, and as modified the judgment should be affirmed, with costs to the plaintiff. Van Brunt, P. J., concurred in result.

HATCH, J. (concurring): I concur in the opinion of Mr. Justice Ingraham so far as it disposes of the question arising between the railway company and the plaintiff, and also between the railway company and Gibson. I also think that the plaintiff is entitled to the judgment which it has obtained against Gibson. The form which the trial of the action assumed conferred authority upon the court to award any relief which the facts warranted; and as it appeared that the defendant Gibson could be made liable for a conversion of the proceeds of the bonds, it was proper for the court to award the judgment against him which it did. I am, therefore, for the affirmance of the judgment in its entirety. The judgment should be affirmed, with costs. Van Brunt, P. J., and Ingraham, J. dissented as to defendant Gibson. PATTERSON and LAUGHLIN, JJ. (concurring): We concur in the opinion of Mr. Justice Ingraham, except so far as the liability of the defendant Gibson to the plaintiff is concerned, and with respect to that we concur in the opinion of Mr. Justice Hatch.

The Jennie Clarkson Home for Children, Respondent, v. Union Pacific Railroad Company, Appellant, Respondent, and Robert Gibson, as General Partner of the Limited Partnership of H. Knickerbacker & Co., Appellant.—Judgment affirmed, with costs.—Appeal from a judgment entered upon the decision of the court at Special Term.—

INGRAHAM, J.: The questions presented in this case are the same as those determined in the case of *Clarkson Home v. Chesapeake & Ohio R. Co.* (ante, p. 491). The judgment in this case, however, gave to the plaintiff a judgment against the defendant Union Pacific Railroad Company and Robert Gibson, as general partner of the limited partnership of H. Knickerbacker & Co. For the reasons stated in the case of *Clarkson Home v. Chesapeake & Ohio R. Co.* we have reached the conclusion that the plaintiff is not entitled to judgment against the defendant Gibson, and the judgment must, therefore, be reversed as to Gibson and the complaint dismissed, with costs to Gibson against the plaintiff. The judgment against the Union Pacific Railroad Company is affirmed, with costs to the plaintiff against the Union Pacific Railroad Company. Van Brunt, P. J., concurs in result.

HATCH, J.: I concur in the opinion of Mr. Justice Ingraham, so far as it disposes of the

question arising between the railroad company and the plaintiff. I also think that the plaintiff is entitled to the judgment which it has obtained against Gibson. The form which the trial of the action assumed conferred authority upon the court to award any relief which the facts warranted; and as it appeared that the defendant Gibson could be made liable for a conversion of the proceeds of the bonds, it was proper for the court to award the judgment against him which it did. I am, therefore, for the affirmance of the judgment in its entirety. The judgment should be affirmed, with costs. PATTERSON and LAUGHLIN, JJ. (concurring): We concur in the opinion of Mr. Justice Ingraham, except so far as the liability of the defendant Gibson to the plaintiff is concerned, and with respect to that we concur in the opinion of Mr. Justice Hatch.

Amelia S. Meinrenken, as Administratrix, etc., of Gustave D. Meinrenken, Deceased, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.

—Judgment and order reversed, new trial ordered, costs to appellant to abide event.—Appeal from a judgment entered upon the verdict of a jury for \$25,000, and also from an order denying a motion for a new trial.—INGRAHAM, J.: Upon a former appeal from a judgment in this action in favor of the plaintiff (81 App. Div. 132), the judgment was reversed and a new trial ordered. Upon the new trial the plaintiff again obtained a verdict, from which the defendant appeals. The locality, the nature of the accident and the testimony to sustain the plaintiff's action are detailed in the opinion upon the former appeal. It was there held that the verdict was against the weight of evidence, both as to the negligence of the defendant and the contributory negligence of the plaintiff's intestate. The tracks of the Hudson river railroad are located between Twelfth avenue and the river. Twelfth avenue does not here appear to be graded, curbed or paved above One Hundred and Thirty-fourth street nor had One Hundred and Thirty-fourth street been laid out west of Twelfth avenue. There was, however, a paved roadway about thirty feet in width that crossed the railroad tracks and furnished access to the river from Twelfth avenue, which had been in use for two or three years prior to the accident. The two center tracks of the defendant are used for passing trains, while the east and west tracks were used for the storage of freight cars. On the west of the tracks there was a roadway extending north from One Hundred and Thirty-fourth street, about sixty feet in width. Eight or ten feet of this roadway was paved, and it was used by wagons and pedestrians in going to a dock at the foot of One Hundred and Thirty-fifth street. There was a garbage dump at the foot of One Hundred and Thirty-fourth street and this paved roadway seems to have been principally used to furnish access to the garbage dock and to remove freight from freight cars standing on the side track. There was no flagman stationed at One Hundred and Thirty-fourth street, the man stationed there during the day leaving at six o'clock, and there were no gates at the crossing at One Hundred and Thirty-fourth street and no electric bells. About nine o'clock on the night of July 30, 1901, a freight train was going north upon the easterly of the middle tracks, and a passenger train was going south on the westerly of the middle tracks, the engine of the passenger train passing the caboose of the freight train at One Hundred and Thirty-first street. There was a clubhouse south of One Hundred and

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Thirty-eighth street, on the Hudson river, west of the defendant's tracks. Upon the night of July 20, 1901, one Connett and plaintiff's intestate, who were members of the club, left the clubhouse shortly before nine o'clock and walked down towards One Hundred and Thirty-fourth street. Though it was a dark night, they were visible for fifty feet after leaving this clubhouse. After they left the clubhouse the passenger train going south passed. It was going fast, and the freight train was then passing it going north. This passenger train was a regular train, known as the "Dolly," passing the fishing house about three minutes before nine o'clock. There were freight cars standing on both the east and west side tracks on the night in question, and upon the west track they extended up to within four or five feet of One Hundred and Thirty-fourth street. The passenger train had at least five cars that were lighted, and it could be seen without difficulty as it approached. The headlight was lighted, but the glass had apparently become smoky or dim. This approaching train was visible 200 feet above the clubhouse, and there was sufficient light to distinguish a man 300 feet away. People, in going to and from this clubhouse, were in the habit of either walking upon the path, to the west of the tracks, or upon the railroad tracks. Smith, a witness who was examined for the plaintiff, testified that he was walking up the track towards One Hundred and Thirty-fourth street; that he arrived at One Hundred and Thirty-fourth street at half-past eight or a quarter to nine o'clock; that he then saw a very long freight train going north; that he stood at the southerly side of the One Hundred and Thirty-fourth street crossing waiting for the freight train to pass; that the engine of the freight train was "pumping pretty hard, and there was rattling of the bumpers;" that as he stood there he looked up the track and saw another train coming; that he then saw two men coming up behind the standing freight car, and that they got over on the crossing; that these men looked up the south-bound track; that the witness looked before they did; that when he looked at the two men he did not see anything coming or hear any whistle or bell ringing; that the first thing he knew he felt the suction of the wind; he saw it was the "Dolly" right on top of him, and he grabbed the bumper of the freight train with his right hand, the rail that is on the side of the step; the moving freight was going up and the "Dolly" was coming down; that he stood on the freight car until the "Dolly" went by, and he got off, half way between One Hundred and Thirty-fourth and One Hundred and Thirty-fifth streets, and walked back to the crossing again and came across a dead body lying near the crossing. On cross-examination he said he stood on the south side of the One Hundred and Thirty-fourth street crossing, between the north-bound and south-bound tracks; that up to the time he felt the suction of air he had been looking at the freight train all the while, but he looked up the track three or four times and did not see anything; that he saw these two men look up the track and he looked up also; that he saw the men before they got to the crossing; that they were coming on the crossing when he first saw them; that he saw them standing on the south side of the crossing between the side track and the south-bound track; that the last time he saw them they were standing there; that it was so dark he could not distinctly see the position they occupied; that they were five or six feet away, but

it was so dark he could not tell how near they were standing to each other, but he could see by one of their heads which way they were looking; that the head of one of them was turned towards One Hundred and Thirty-eighth street; he did not know which one was looking that way; that as the freight train went by there was a good deal of smoke coming from the engine; that he could see the cars going by because he was near enough to see them, but in other respects he could not see, it was so dark and dense. From this evidence it is possible to find that the dead man, whose body was found five or more feet north of the crossing, was the man seen upon the crossing, or that he was free from contributory negligence? It is quite evident that it would be a physical impossibility for the body of a man who was struck by a south-bound car on the crossing to be afterwards found north of the crossing. If he was struck down where he stood, he must have been standing where his body was found, and while it is quite probable that the body would be carried along with the train, it is inconceivable that it would have been thrown by the train back in the direction from which the train was coming. The deceased and his companion were familiar with the locality and with the fact that this passenger train passed at about this time. People from this clubhouse were in the habit of walking down the tracks or on the road west of the track. The standing freight cars were five feet or less from the crossing, and a person to get on the track, five feet or more north of the crossing, would necessarily have had to walk around the freight car and then to the north. It is much more probable, considering the location of the freight car and the place in which the body of the plaintiff's intestate was found, that he was walking down the track when struck by the passing train; but assuming that the two men were the ones that the witness Smith saw, and that, notwithstanding the contradictions in his testimony, he did see two men standing on the crossing west of the south-bound track shortly before the train came, they were then in a position of safety, waiting for the freight train upon the north-bound track to cross. To account for the accident, assuming Smith's story to be true, they must have stepped on the track directly in front of the approaching train and walked north on the track. The passenger train could be seen for 200 feet, as testified to by a witness for the plaintiff, who saw the train approaching at the clubhouse. It may be that the approaching passenger train was at One Hundred and Thirty-fourth street somewhat obscured by the smoke of the freight engine, but certainly these men were not justified in stepping in front of the train and walking north on the track in front of the approaching train instead of remaining in a place of safety off the track until the freight train had passed. Upon the former appeal we thought that a verdict that the deceased was free from contributory negligence was clearly against the weight of evidence, and I cannot see that this evidence has at all changed the facts upon which that conclusion was reached. We have the same situation and the same conditions. There is nothing to explain how it was possible for either of the men that were killed to have been thrown by a south-bound train a distance to the north of the position at which it is said they were seen just before they were struck, and to sustain this verdict the jury must have been justified in finding that these two men, standing or waiting on this railroad track, with a passenger train about

due, were relieved from the imputation of negligence. I can find no evidence that would justify such a finding, and considering the undisputed fact as to the position of the body of the plaintiff's intestate, it is apparent that he was upon the track off the crossing when struck, and under conditions which negative the finding that he exercised any care in assuming the position that he did upon this track. We can see no escape from the conclusion that the plaintiff failed to show that the deceased was free from contributory negligence. It follows that the judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event. Van Brunt, P. J., and Laughlin, J., concurred; Hatch, J., dissented.

William Casloos, an Infant, by John Casloos, his Guardian ad Litem, Respondent, v. Metropolitan Street Railway Company, Appellant.—Judgment and order reversed, new trial ordered, costs to appellant to abide event.—Appeal from a judgment entered upon the verdict of a jury for \$15,000, and from an order denying a motion for a new trial.—

MCLAUGHLIN, J.: Action to recover damages for personal injuries on the ground that the same were caused by defendant's negligence. There have been three trials and two previous appeals to this court. The facts are so fully stated in the opinions delivered on the former appeals that it is unnecessary to again restate them. (70 App. Div. 606; 78 Id. 635.) On the first trial the plaintiff had a recovery which was reversed by this court and a new trial ordered on the ground of an error in the charge. On the second trial plaintiff again had a recovery which was also reversed by this court and a new trial ordered on the ground that the verdict was brought about either by the refusal of the jury to follow the instructions of the trial court, or else was the result of prejudice or misapprehension of the issues involved. On the third trial plaintiff again had a recovery and the defendant has again appealed. On the first and second trials the plaintiff endeavored to prove that the defendant was negligent not only in the operation of the car which ran over the plaintiff, but also in having it equipped with a defective brake. On the last trial, however, the question as to the defective brake was eliminated and the plaintiff's proof as to the alleged negligence of the defendant was confined solely to the operation of the car. After a careful consideration of all the evidence bearing on this subject I am unable to find any justification for the verdict. This evidence does not establish defendant's negligence, nor does it permit of an inference that an ordinarily prudent man would have acted under the circumstances otherwise than the driver of the car did. Indeed as I read this record the evidence as to the operation of the car is precisely in legal effect the same as it was upon the first trial, and then this court was unanimously of the opinion that the evidence would not support a finding that the driver of the car did not do his utmost to prevent injury to the plaintiff. Justice O'Brien, who delivered the opinion of the court, said: "There is no evidence in this record to support a finding that the driver failed to do his utmost, after knowledge that those crossing in front of him were in danger, to avert the accident." It is true that on the second appeal it was intimated in the opinion delivered — although such intimation was not necessary to or involved in the decision made — that the evidence as to the operation of the car had been so far changed

on the second trial as to permit a finding of negligence. The same justice who delivered the first opinion said: "An examination of the record discloses that the testimony now presented upon the subject of the operation of the car by the driver is not precisely the same as it was on the prior appeal. Then the driver testified that he first saw the plaintiff as he stood in the middle of the track five feet ahead, and he at once put on the brake and separated his horses and tried by shouting to avert the accident. On this trial he testified that he first saw the plaintiff and those who accompanied him while they were on the east-bound track, going across the street with the evident purpose of crossing in front of him, and when he had his horses' heads just over the north-bound Second avenue track," and at that time he judged the party were ten or twelve feet in front of the horses. The difference in the testimony thus adverted to did not appear on the last trial. The driver of the car then testified, as he did upon the first trial, that he first saw the plaintiff when the women who were with him jumped back and left him on the tracks, and that he was then about five feet from the horses' heads. He further testified — and his testimony in this respect is not contradicted — that as soon as he saw the plaintiff he did all he could to stop the car, but was unable to do so until after the plaintiff was knocked down by one of the horses or the whiffletree, and injured. So that if we give to the testimony of the driver of the car, and the other testimony bearing upon the operation of the car, all the force that can be legally given to it, as well as every legal inference which can be drawn from it, I think it fails to establish fault on the part of the driver of the car, or that the plaintiff's injuries were the result of any negligent act of the defendant. In this connection it will be remembered that the driver reduced the speed of the car while crossing the avenue to between three and four miles an hour, and that as soon as he saw the women accompanying the plaintiff approaching a place of danger he warned them of the approach of the car and in ample time to permit them to escape. They left the plaintiff standing upon the tracks, and it was at this instant that the driver for the first time saw him, and he immediately did his utmost to bring his car to a standstill and avoid the accident. There is no question of excessive speed of the car presented, and the only possible ground of negligence which can be suggested is the failure of the driver to stop the car before the plaintiff was injured, and this the evidence shows he could not do. The testimony of the driver of the car is clear and the fact is uncontradicted that he acted promptly as soon as he saw the plaintiff, and put forth his utmost endeavors to prevent injuring him. There is nothing to show that the driver under the circumstances failed to exercise the care of an ordinarily prudent person, or that his negligence resulted in plaintiff's injury. Upon the whole case, therefore, I am of the opinion that the plaintiff failed to prove that his injuries were the result of defendant's negligence, and that the defendant's exception to the denial of the motion, made at the close of the trial, to dismiss the complaint was well taken. If I am right in this then it follows that the judgment and order appealed from must be reversed and a new trial ordered, with costs to the appellant to abide the event. Van Brunt, P. J., and Ingraham, J., concurred; Patterson and O'Brien, JJ., dissented.

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- Margaret J. McChesney, Respondent, v. James Moore, Appellant.—Interlocutory judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below. Van Brunt, P. J., and Hatch, J., dissented. No opinion.
- William Skinner, Respondent, v. Milton C. Gray, Appellant.—Judgment affirmed, with costs. No opinion.
- The Dental Protective Association of the United States, Appellant, v. The International Tooth Crown Company, Respondent.—Appeal from decision dismissed. Judgment affirmed, with costs. No opinion.
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- Elizabeth Murphy, an Infant, by her Guardian ad Litem, Sarah Kelly, Respondent, v. Mary Ryan, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. Van Brunt, P. J., and Ingraham, J., dissented.
- Mathilda Flores, Respondent, v. Juan B. Flores, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.
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- Arthur A. Housman and Others v. Mark J. Straus.—Motion granted, with ten dollars costs.
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- In the Matter of Board of Rapid Transit.—Application granted.
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- William Banker v. John Schade and Others.—Motion granted, so far as to dismiss appeal, with ten dollars costs.
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- George A. Stearns v. Shepard & Morse Lumber Company.—Motion denied, with ten dollars costs.
- The People of the State of New York ex rel. Ambrose K. Ely v. Edward M. Grout, Comptroller of the City of New York.—Motion granted, with ten dollars costs.
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- Frank A. Daniels, Respondent, v. William A. Rogers and Others, Defendants, Impleaded with Archer Brown, Appellant.—Interlocutory judgment affirmed, with costs, with leave to defendant to amend answer on payment of costs in this court and in the court below. No opinion.
- Jacob Wilpon, Respondent, v. Metropolitan Street Railway Company, Appellant.—Judgment and order affirmed, with costs. No opinion.
- Amy Ray Rosenfeld, Appellant, v. Mary M. Davidson, Respondent.—Judgment and order affirmed, with costs. No opinion.
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- Daniel V. Arthur, Respondent, v. Henry B. Sire, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.
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- In the Matter of the Application of The Mayor, Aldermen and Commonalty of the City of New York, Relative to Acquiring Title, etc., for the Purpose of Opening, Widening and Extending Elm Street, etc., in the Sixth, Fourteenth and Fifteenth Wards of the City of New York. Benjamin Altman and Others, Appellants; The City of New York, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- The People of the State of New York ex rel. George Durand-Ruel, Appellant, v. James L. Wells and Others, as Commissioners of Taxes and Assessments of the City of New York, Respondents.—Order affirmed, with ten dollars costs and disbursements. No opinion.
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- Charles A. Balles, Appellant, v. George G. Aillinger, as President of New York Stereotypers' Union No. 1, an Unincorporated Association Composed of More than Seven Members, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.
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— *Quere, as to the right of the Appellate Division, upon an appeal from a judgment of the Court of Claims, to modify such judgment by increasing the award.*

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— *Costs on appeal from a judgment of a justice of the peace* — when interest is considered in determining whether a recovery is more or less than an offer.

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BANKING — Savings bank deposit — change of the account by the depositor so as to read "In account with Margaret Smith (the depositor), or son Frank J." — delivery of the bank book to a third person with instructions to deliver it to the son — the son takes the deposit if he survives his mother — *quare* whether the transaction constituted a gift *inter vivos*.

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— Crediting by a bank to a customer's account the proceeds of a note discounted — it is not a payment for the note — the bank does not become a holder for value — effect of notice to the bank that there was an entire failure of consideration for the note before it pays over the money — how far notice of dishonor is notice of such infirmity in the paper.

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— The delivery of savings bank books accompanied by the statement "If I die, bury me out of this and what is left is yours" — the transaction constitutes a gift *causa mortis* — proof that a particular bank book was among those delivered. *MAHON v. DIME SAVINGS BANK*..... 506

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BANKRUPTCY — *Trustee in bankruptcy—he is not invested with the legal title to property, transferred by the bankrupt in violation of the Bankruptcy Law.*] 1. With respect to the property transferred by a bankrupt to a creditor in violation of subdivision b of section 60 of the Bankruptcy Law, providing, "If a bankrupt shall have given a preference within four months before the filing of a petition * * * and the person receiving it * * * shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person," the trustee in bankruptcy is not, by the mere force of his appointment, invested with the legal title or the right to the possession of the property so transferred, but is permitted to regard the transfer as voidable at his election. *HOUGHTON v. STINER*. 171

2. — *Remedy of the trustee.*] The remedy of the trustee with respect to such property is by an action in equity and he is not obliged to resort to an action at law.

Quere, whether he could maintain an action at law. *Id.*

3. — *Action by a trustee in bankruptcy against a judgment creditor of the bankrupt—an adjudication in the bankruptcy proceeding that the bankrupt was insolvent when the judgment was obtained against him, is conclusive against the judgment creditor.*] Where, within four months after the recovery of a number of judgments, creditors of the judgment debtor institute involuntary bankruptcy proceedings under the Federal Bankruptcy Act, against the judgment debtor, an adjudication made in the bankruptcy proceeding that the judgment debtor was insolvent at the time the judgments were recovered, is conclusive against one of the judgment creditors in an action brought against her by the trustee in bankruptcy to recover moneys which she received under an execution issued upon her judgment, notwithstanding that none of the judgment creditors were parties to the bankruptcy proceeding.

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4. — *Refusal to allow a plaintiff, who has rested, to reopen his case—when improper.*] Where the trustee in bankruptcy rests his case, after putting in evidence the decree in bankruptcy, and the trial court decides that such decree does not, as against the judgment creditor, furnish evidence of the judgment debtor's insolvency at the time the judgments were recovered, the refusal to permit the trustee in bankruptcy to reopen the case, in order to introduce common-law proof of the insolvency of the judgment debtor at the time of the recovery of the judgments, constitutes an improper exercise of the discretion vested in the court. *Id.*

BILL OF LADING — *For transportation by land.*

See RAILROAD.

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BILLS AND NOTES — *What instrument is a promissory note—when, although it recites a consideration, not creating a legal obligation, a legal consideration will be presumed in support thereof.*] 1. *Gerardine H. Hickok* brought an action against the executrices of *Ella F. Bunting* upon the following instrument:

"NEW YORK, December —, 1893.

"Having been cause of a money loss to my friend, *Gerardine H. Hickok*, I have given her three thousand dollars. I hold this amount in trust for her, and one year after date or thereafter, on demand, I promise to pay to the order of *Gerardine H. Hickok*, her heirs or assigns, Three thousand dollars with interest.

ELLA F. BUNTING,
1. 16, '94.

"216 East 12th St., N. Y."

The plaintiff rested after proving the signature to the instrument, the amount of interest due thereon, and offering the instrument in evidence. The defendants offered no evidence.

Held, that the plaintiff had made out a *prima facie* case, and that the court properly directed a verdict in her favor;

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That the instrument was a valid promissory note, and that, as it did not appear upon the face thereof that there was no consideration for it, or only an invalid consideration, it would be presumed that it was supported by a valid consideration. *HICKOK v. BUNTING*..... 167

2. — *Crediting by a bank to a customer's account the proceeds of a note discounted—it is not a payment for the note.*] The crediting by a bank of the proceeds of a note, which it has discounted, to the account of the customer for whom the discount was made, is not, of itself, a payment for the note; it is simply a promise by the bank to pay such proceeds to the customer by honoring his checks or drafts in the ordinary way pursued by banking institutions. The bank does not, by such transaction, transfer to the customer the title to any particular money, but simply becomes a debtor to the customer to the amount of such claim.

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3. — *The bank does not become a holder for value.*] The bank does not become a holder of the note for value until it has paid over the proceeds of the note to the payee. *Id.*

4. — *Effect of notice to the bank that there was an entire failure of consideration for the note before it pays over the money.*] A bank which discounts, in due course of business, a promissory note for the payee thereof before maturity, and places the proceeds of the discount to the credit of the payee and retains the same until after it obtains knowledge that there is an entire failure of consideration for the note as between the maker and the payee thereof, cannot, after bringing an action against the maker and the payee to recover upon the note, pay the proceeds of the discount to the payee and retain the right to insist that it is a holder for value and is protected from any defense existing between the maker and the payee.

In such a case the bank is not a holder of the note in due course as defined by section 91 of the Negotiable Instruments Law (Laws of 1897, chap. 612). *Id.*

5. — *Section 93 of the Negotiable Instruments Law is declaratory of the existing law.*] Section 93 of the Negotiable Instruments Law, which provides, "Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him," is simply declaratory of the existing law. *Id.*

6. — *How far notice of dishonor is notice of such infirmity in the paper.*] *Quære*, whether notice of dishonor of a note is alone sufficient in all cases to constitute notice, to a bank discounting the note, of an infirmity therein or of a defect in the title of the person who discounted it. *Id.*

— Continuing guaranty of the payment of notes—terminated by notice of revocation. *LINCOLN NATIONAL BANK v. FISCHER-HANSEN*..... 318
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BOND—Railroad bonds registered in the name of a charitable corporation—the registration changed to bearer under an unauthorized transfer by its treasurer and a forged resolution—liability to the charitable corporation of the railroad company and of a brokerage house which witnessed the transfer—liability of the brokerage house to the railroad company.

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—Receiver in a matrimonial action—effect of the order appointing him not requiring him to give a bond—it does not excuse the husband for refusing to deliver his property to the receiver. **MATTER OF SPIES**..... 175
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CARRIER—By land.
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See NEGLIGENCE.

CERTIORARI—Tax—scope of the statutory writ of certiorari to review an assessment—appointment of a referee to take testimony—it does not preclude a decision that upon the face of the return the tax was invalid—assessment of the capital stock and surplus of a corporation.

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—The remedy where there is an error in an audit by a town board is by certiorari—a mandamus is improper.

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- § 515 — Counterclaim authorized by subdivision 2 of section 502 of the Code of Civil Procedure — if not replied to, the defendant may take judgment — form of such judgment.
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- § 2280 — Contempt proceedings — the testimony of a witness should be taken, not before a referee, but before the court — his attendance required by subpoena or order.
See PEOPLE EX REL. TUELL v. PAINE. 303
- § 2595 — An action is not maintainable by an administrator on a note deposited with a trust company pursuant to section 2595 of the Code of Civil Procedure — a creditor's action cannot be based on a judgment so obtained — the fact that the administrator afterwards obtains title to the note in her individual capacity does not entitle her to maintain the creditor's suit.
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- §§ 2660, 2662 — Letters of administration — they will not be granted on the application of a non-resident alien to the public administrator — the public administrator or next of kin must petition therefor — a claim in favor of an estate within the jurisdiction of a surrogate is property within his county — the public administrator is "contingently" entitled to letters.
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- §§ 2660, 2662 — Letters of administration — they cannot be granted to a non-resident alien nor to a resident designated by him — he is not "contingently" entitled to letters — who is — the public administrator is entitled either absolutely or contingently.
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- § 2719 — Power of an executor to compromise a claim against his testator's estate — the Surrogate's Court may authorize it.
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- § 3070 — Costs on appeal from a judgment of a justice of the peace — when interest is considered in determining whether a recovery is more or less than an offer.
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- § 3228 — Costs on appeal from a judgment of a justice of the peace — when interest is considered in determining whether a recovery is more or less than an offer.
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COMPROMISE — *By an executor of a claim against his testator's estate.*
See SURROGATE.

COMPTROLLER — *Of the State of New York — review by certiorari of his action under the Tax Law.*
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CONFLICT OF LAW — *Fraternal beneficiary corporation of the State of Indiana — attachment by a beneficiary of a "relief fund" deposited in bank in the State of New York — right thereto of the attaching beneficiary as against receivers of the corporation appointed in Indiana and in New York — such fund is not impressed with a trust.*
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CONSIDERATION — *For a promissory note.*
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CONSOLIDATION — *Of two actions.*
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CONSPIRACY — *An unlawful combination enjoined from spying upon another person's business.] Members of a combination, who, after such combination has been declared unlawful by the Court of Appeals, for the purpose of carrying out the objects of such illegal combination, spy upon another person's business, thereby seriously injuring it, will be enjoined from persisting in such espionage. STRAUS v. AMERICAN PUBLISHERS' ASSN. 350*

CONSTITUTIONAL LAW — *Conveyance of land to a hospital by a municipality — when the Constitution prohibits the Legislature from authorizing it — the fact that the land was thereby made subject to tax does not afford a consideration.] 1. The charter of "The Jews' Hospital in New York," which was incorporated pursuant to chapter 819 of the Laws of 1848, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies," stated that the purpose of its incorporation was the giving of medical and surgical aid to persons of the Jewish persuasion and for all other purposes appertaining to hospitals and dispensaries. The name of the corporation was subsequently changed to The Mount Sinai Hospital, but no other change was made in its charter. After the change in name was effected, its constitution was changed so as to declare the object of the corporation to be "the establishment, support and management of an institution to be known as the Mount Sinai Hospital, for the purpose of affording medical and surgical aid and nursing to sick or disabled persons of any creed or nationality."*

In 1871 it built a hospital building and in 1894 a dispensary upon two parcels of land which were originally part of the common lands of the city of New York and which had been leased to it by the city at a nominal rental, the first parcel pursuant to section 5 of chapter 853 of the Laws of 1868, and the second parcel pursuant to chapter 189 of the Laws of 1861, chapter 45 of the Laws of 1892 and chapter 553 of the Laws of 1892.

CONSTITUTIONAL LAW — *Continued.*

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The lease of the first plot of ground provided that the premises should be used for a hospital and for the charitable and benevolent purposes for which the lessee was incorporated, and that the buildings erected thereon should be used for such purposes, and should at all times be open for public purposes and to patients of all creeds and denominations. The lease was conditioned to be void if such buildings were not erected and maintained, or if the lessee should cease to use it for a hospital, or to keep the same open for patients of all creeds and denominations, or should use it for any other purpose.

The lease of the second plot of ground contained a covenant that the lessee would "erect or cause to be erected, or maintain upon the said premises hereby demised, a building for the use of said hospital and for the reception and treatment of patients needing hospital treatment, and that said party of the second part will not make any charge or receive any compensation for the treatment of patients in any of the wards of the building which shall be erected on the hereby demised premises."

Thereafter, by chapter 257 of the Laws of 1898, the city was authorized to convey the leased lands in the first parcel to the hospital corporation in fee simple absolute, so as to permit and to authorize it to sell and convey or lease the same and devote the proceeds of such sale or the income from such leases to the maintenance and support of the hospital. The acts provided, "But nothing herein contained shall be construed to compel the vendee or lessee to see to the proper application of the purchase price or rent, nor shall any misapplication thereof affect the validity of any deeds or leases made by the Mount Sinai Hospital."

By chapter 166 of the Laws of 1900 a like conveyance was authorized under like conditions of the second parcel.

Pursuant to these acts the hospital corporation presented petitions in which it stated that the leased lands afforded it insufficient space and accommodation, and that it had purchased other lands and desired to sell the leased lands and devote the proceeds thereof to the erection of buildings on the property which it had purchased. The petitions contained the following clause: "Your petitioner pledges itself to apply the proceeds of such sale to the purposes and objects of its incorporation as set forth in its certificate of incorporation as modified by the laws affecting the same."

The commissioners of the sinking fund thereafter passed resolutions authorizing grants of the premises held under the leases to be made to the corporation in fee simple absolute, provided, however, "that the proceeds of said sale, or the income from such leases as may be made by it shall be applied to the maintenance and support of said The Mount Sinai Hospital, but no purchaser or lessee of the whole or any part of said property, his or their heirs, executors, administrators and assigns, shall be compelled to see to the proper application of said proceeds or rentals, nor shall any misapplication thereof affect the validity of any deeds or leases made by the Mount Sinai Hospital; and further provided, that such lots and the improvements thereon shall not be exempt from taxation."

Subsequently the city conveyed the leased property to the hospital corporation in fee simple absolute by deeds which recited the respective resolutions of the commissioners of the sinking fund.

Held, that the conveyances imposed upon the hospital corporation no further obligation than that imposed by its charter;

That the grants were, in all essential respects, gifts and endowments, and that as such they were in violation of the Constitution of the State of New York;

That the conveyances operated in legal effect as a gift of public property for a private use, and were in violation of section 10 of article 8 of the Constitution, which provides, "No * * * city * * * shall hereafter give any * * * property * * * to or in aid of any individual, association or corporation. * * * This section shall not prevent such * * * city * * * from making such provision for the aid or support of its poor as may be authorized by law;"

That the conveyances were not authorized by section 14 of article 8 of the State Constitution, which provides, "Nothing in this Constitution contained shall prevent any * * * city * * * from providing for the care, support, maintenance and secular education of inmates of orphan asylums,

CONSTITUTIONAL LAW — *Continued.*

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homes for dependent children, or correctional institutions, whether under public or private control. Payments by * * * cities * * * to charitable * * * institutions wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the Legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the State Board of Charities. Such rules shall be subject to the control of the Legislature by general laws ;"

That the latter section contemplates the payment of money to charitable institutions to be applied subject to the rules and regulations established by the State Board of Charities, and not the making of absolute grants of real estate subject to no restrictions whatever:

That the fact that the land conveyed to the hospital corporation would be subject to taxation in the hands of its vendee did not constitute a consideration for the grants. *MOUNT SINAI HOSPITAL v. HYMAN*..... 270

2. — *Cider vinegar* — that part of section 50 of the Agricultural Law fixing the percentage of acetic acid which it shall contain is unconstitutional — the remainder of the section and sections 51, 52 and 53 of the statute are constitutional.] Section 50 of the Agricultural Law (Laws of 1908, chap. 338, as amd. by Laws of 1901, chap. 806) provides: "All vinegar which contains any proportion of lead, copper, sulphuric acid, or other ingredients injurious to health, or any artificial coloring matter, or which has not an acidity equivalent to the presence of at least four and one-half per centum, by weight, of absolute acetic acid, or cider vinegar which has less than such an amount of acidity, or less than two per centum of cider vinegar solids on full evaporation over boiling water, shall be deemed adulterated. The term cider vinegar, when used in this article, means vinegar made exclusively from pure apple juice. Provided, however, that cider vinegar made by a farmer in this State, exclusively from apples grown on his land, or their equivalent in cider taken in exchange therefor, shall not be deemed adulterated, if it contain two per centum solids and sufficient alcohol to develop the required amount of acetic acid."

Held, that the section, in so far as it relates to the percentage of acetic acid which unadulterated cider vinegar shall possess, violates section 6 of article 1 of the Constitution of the State of New York and the 14th amendment of the United States Constitution, providing that no person shall be deprived of liberty without due process of law, in that it permits farmers and purchasers from farmers to deal in cider vinegar which does not contain four and a half per cent of acetic acid and prohibits all other persons from manufacturing and dealing in cider vinegar which does not possess that percentage of acetic acid;

That the remaining portions of section 50 are constitutional, as are also sections 51, 52 and 53 of the statute, which prohibit the manufacture and sale of adulterated vinegar, require the branding of packages containing cider vinegar, and impose penalties for violations of the provisions of the statute.

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— At an election held on November third a vacancy in the office of justice of the Supreme Court occurring on the previous August third may be filled.

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— *Of contracts.*

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— *Of statutes.*

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— *Of wills.*

See WILL.

CONTEMPT—*Contempt proceedings—the testimony of a witness should not be taken before a referee.*] 1. Where the testimony of a witness is material in a proceeding to punish a judgment debtor for contempt, because of the alleged violation by the latter of an injunction clause, contained in an order for his examination in proceedings supplementary to execution, the judgment creditor is not entitled to an order appointing a referee to take the witness' testimony. *PEOPLE EX REL. TURLL v. PAINE*..... 808

2. — *The attendance of the witness before the court, how obtained.*] Such testimony may be taken directly in the contempt proceeding itself, and the witness may be compelled to attend before the court on such proceeding either by subpoena or by an order under the provisions of section 2280 of the Code of Civil Procedure. *Id.*

3. — *An order adjudging a party guilty of a criminal contempt must set forth the particular circumstances.*] An order adjudging the defendants in an action guilty of a criminal contempt for disobeying an injunction *pendente lite* which does not set forth the particular circumstances of the offense, as required by section 11 of the Code of Civil Procedure, is fatally defective; a general statement that the defendants disobeyed the injunction order is insufficient. *RONCORONI v. GROSS*..... 806

CONTRACT—*False representations by one of three persons engaged in a joint adventure—when they relate to existing facts and not to expected events—when the relations between the parties are of a fiduciary character—what constitutes a breach of such fiduciary obligation—effect of an agreement by which two of the associates were authorized to make changes and modifications in the contract.*] 1. Charles L. Spier, at the request of Charles L. Hyde and William R. Garrison, secured options on 10,100 shares out of a total of 20,000 shares of the stock of the Goodson Type Casting and Setting Machine Company. Hyde and Garrison paid for the stock on which the options were obtained at the rate of \$10 and \$11 per share. Thereafter, in February, 1899, Spier had a conversation with Hyde relating to the compensation which the former was to receive in connection with the venture. After the matter had been discussed, Hyde wrote out the following memorandum :

"10,100 shares in the pool.	O. K. H.
5,100 H. and G.	O. K. S.

5,000
250 Chas. L. Spier.

4,750 at 22½—about \$106,875.

"H. & G. receive \$106,000.

"Spier receives 250 shares of stock in the pool.

"Now, if we sell the stock above 22½, Mr. Spier will be entitled to receive the difference between 22½ and 27, to be taken in stock at 22½ per share. If we sell at over 27, then profits to be equally divided between Garrison, Spier & Hyde." This memorandum was O. K'd by Hyde and Spier.

It was subsequently concluded that the 10,100 shares of stock could be used to better advantage by the formation of a new corporation to take over the stock and property of the Goodson Type Casting and Setting Machine Company. Spier, on being consulted, agreed to this proposition. A contract was thereupon, on March 27, 1899, entered into between the parties, which provided, "The new company may be called the Goodson Graphotype Company, and it is our intention to exchange 10,100 shares of its stock for an equal number of shares of the Goodson Typecasting & Setting Machine Company. We expect to place this 10,100 shares of stock of the Graphotype Company (*i. e.* the new company) in portions from time to time in a pool to be charged to the pool at the rate of \$22.75 per share."

The contract then expressed the hope that the stock would be underwritten or sold and if such expectation were realized to reserve a part of the money obtained from such sources as working capital and to defray expenses. It further provided that the profits upon the 10,100 shares in the pool would be estimated as the net sum realized upon the sale of the stock after deducting the \$22.75 per share and expenses, and "after deducting further whatever

CONTRACT — Continued.

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sum of money those depositing stock in the pool may desire to reserve" for the use of the company as working capital. It was then provided that all questions relating to modifications or change were to be determined by Hyde and Garrison; that in consideration for Spier's services and of his agreement to devote his entire time to the promotion of the new company, there should be set apart for him as full compensation fifteen per cent upon whatever net profits might be found to have been realized by the sale of the pooled stock "after the entire 10,100 shares have been pooled and sold."

It further provided: "It is understood, however, that this 15% interest relates only and applies solely to the 10,100 shares of stock of the new company and to the net profits, if any, to be derived from the sale thereof on the basis as above stated."

May 6, 1899, Hyde made an agreement with a firm of bankers reciting the intention of Hyde and his associates to form a corporation for the purpose of acquiring the capital stock and the patents of the Goodson Type Casting and Setting Machine Company, and providing that the bankers would, on or before May 23, 1899, if their examination of the patents proved satisfactory, purchase from Hyde 10,000 shares of the preferred stock and 10,000 shares of the common stock of the new company; that the new company was to have 25,000 shares of preferred stock of the par value of \$100 each and 25,000 shares of common stock of the par value of \$100 each; that the new company was to issue to Hyde 24,999 shares of preferred stock and 25,000 shares of the common stock, for which Hyde was to deliver to the new company the 10,100 shares of stock of the old company and \$374,000 in cash; that Hyde was to procure, by purchase or exchange, all of the balance of the stock of the old company, amounting to 9,900 shares, and to transfer it to the new company, and that for each share of stock of the old company Hyde was to receive of the amount issued to him by the new company one share of preferred stock and one share of common stock; that in the event that Hyde was unable to acquire all of the stock of the old company by the 4th of September, 1899, he should on that date return to the new company the amount of common and preferred stock to which he was not entitled under the contract. It was further provided that on or before the 31st day of May, 1899, Taylor & Co. would pay to Hyde, in the event that their examination of the machinery and patents owned by the company were satisfactory, the sum of \$187,500 on account of 10,000 shares of preferred and 10,000 shares of common stock of the new company, purchased by them from Hyde, and that the remaining \$582,500 on account of such purchase was to be paid by Taylor & Co. to Hyde in three equal installments, payable July 1, 1899, September 1, 1899, and November 1, 1899, and that Hyde was to deposit in a trust company 10,000 shares of the preferred stock and 10,000 shares of common stock, to be held by the company for one year from the date of the agreement, and not to be sold within that time.

On May 8, 1899, after the contract with the firm of bankers had been entered into, Hyde represented to Spier that the profits of the pool were about 2,475 shares, and, in reliance upon this representation, Spier, on that date, executed an agreement that his compensation should be estimated on that basis. Spier was ignorant of the making of the contract with the firm of bankers or of the extent of the profits realized from the pool, and Hyde did not make a full disclosure of the situation to him.

The new corporation was subsequently organized, and Hyde and Garrison received profits therefrom largely in excess of the amount represented to Spier.

In an action brought by Spier against Hyde and Garrison to obtain an accounting with respect to the 10,100 shares of pooled stock, it was

Held, that by the agreement executed between Spier and Hyde in February, 1899, Spier secured the same title to the 250 shares allotted to him as Hyde and Garrison had to the remaining stock in the pool;

That whether the relation created between the parties by this agreement was a technical partnership or a mere joint venture was of no consequence, as, in either case, the same legal rules would be applicable;

That the relation created between Spier and Garrison and Hyde was fiduciary in character, and imposed upon Garrison and Hyde the duty of exercising the most scrupulous good faith towards Spier and entitled the latter to maintain an action in equity for an accounting with respect to the property so held;

CONTRACT — Continued.

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That the fiduciary relation existing between the parties was not changed by the contract of March twenty-seventh, and that they owed Spier the duty of carrying out the terms of this contract so as to protect his interests;

That while the contract empowered Hyde and Garrison to make changes and modifications in the contract, they could not do so at the expense of the plaintiff without obtaining his consent after making a full disclosure of the situation;

That, under the agreement of March 27, 1899, Spier was entitled to fifteen per cent of all profits derived from the 10,100 shares of the stock of the old company independent of the form which such shares of stock assumed or of the manner in which the profits were derived from their use;

That Hyde and Garrison could not swell the volume of stock to be issued by that new company and then claim that Spier's rights were confined to an interest in 10,100 shares of the stock of the new company;

That at the time the contract of May 8, 1899, was executed by Spier, the fiduciary relation between the parties still existed;

That the representations made by Hyde, which induced Spier to execute that contract, related not to expected events, but to existing facts;

That in making such representations and in failing to disclose the situation, Hyde and Garrison were guilty of a breach of their fiduciary obligation to Spier, and that, for these reasons, the contract of May eighth was not binding upon Spier. SPIER v. HYDE..... 467

2. — *Building contract — when a sub-contractor is not entitled to an extension of time because of "the abandonment of the work by the employees through no default of his" — failure to present a written application therefor — unjustifiable interference by him with work done by the contractor inducing a strike.* The principal contractor for the construction of a building entered into a sub-contract for the performance of a portion of the work, which provided that the sub-contractor should prosecute the work as rapidly as permitted by the progress of the building, and should complete it in season not to delay the finishing of the buildings, "provided he is not obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the said first party, or of any other contractor employed upon the work, or by any damage which may happen by the action of the elements, or by the abandonment of the work by the employees through no default of his, in which event an extension of time equivalent to such delay shall be granted upon application to the said first party (the principal contractor) in writing within twenty-four hours of the occurrence of such delay;" that "in case of any failure or unreasonable delay of the said second party (the sub-contractor) whether by act or default in the performance of any of the above stipulations or compliance with the true intent of these presents, not authorized in writing by the said party of the first part, it shall be lawful for the said party of the first part, after three days' notice in writing to said party of the second part, to provide other workmen and materials to complete the said work in the place of the said party of the second part, and to deduct the cost and charges thereby occasioned from the sums otherwise becoming due to the said party of the second part under this agreement without prejudice to any other remedy which the said party of the first part may have for breach thereof."

During the progress of the work cracks appeared in the plastering work done by the sub-contractor, and the principal contractor directed him to remedy them. The sub-contractor refused to do so on the ground that the cracks were caused by the defective work of other parties. The sub-contractor having persisted in his refusal to remedy the defect, the principal contractor, after repeatedly demanding that the sub-contractor complete his work, which he admitted that he was bound to do, and after notifying the sub-contractor of his intention to do so, employed plasterers to remedy the defects.

Thereafter the sub-contractor criticized a delegate of the plasterers' union for furnishing the principal contractor with men to fill up the cracks. As a result of this, the plasterers in the employ of the sub-contractor struck. The sub-contractor did not make a written application for an extension of time on account of the delay, and thereafter made no attempt to complete his work, although the principal contractor again called his attention to his failure to do so, and notified him that, in view of his continued default, the work would be completed by the principal contractor.

CONTRACT — Continued.

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Held, that the sub-contractor had not brought the case within the protection of the provisions of the contract relating to "the abandonment of the work by the employees through no default of his, in which event an extension of time equivalent to such delay shall be granted upon application to said first party in writing within twenty-four hours of the occurrence of such delay."

First, because no written application was presented to the principal contractor within twenty-four hours of the happening of the delay.

Second, because the cause of the strike was the unjustifiable interference by the sub-contractor in the work being done by the plasterers under the direction of the principal contractor, and the strike could not, therefore, be claimed by the sub-contractor to have arisen "through no default of his."

MILLER v. NORCROSS..... 352

3. — *Contract to share in the profits of a purchase of real property — oral agreement by one party to give his interest therein to the other, who assumed the incumbrances on the property — enforced against the party transferring his interest and against his undisclosed assignee.* John B. Smith, who had contracted to purchase certain premises for \$140,000, \$15,000 to be paid in cash and \$125,000 by a mortgage upon the premises, made a proposition to one Kissel that if the latter would procure the amount of the cash payment, by obtaining a loan on the security of a second mortgage upon the property, the purchase should be made for their joint account as copartners. Kissel accepted the proposal and procured the loan. The property was thereupon conveyed to Smith and he executed to the grantors a first mortgage for \$125,000 and a second mortgage to secure the loan procured by Kissel.

Thereafter Smith, for private reasons of his own, conveyed the property to one of Kissel's clerks. Subsequently an action was brought to foreclose the second mortgage, which was held by Kissel's brother. Smith thereupon went to Kissel and informed him that the foreclosure of the second mortgage was embarrassing him, and that if Kissel would take care of the mortgages, Smith would, in consideration thereof, release him from any claim of any interest in the profits realized upon the sale of the premises. Kissel, in reliance upon Smith's promise, paid off the incumbrances upon the property and subsequently sold it at a profit.

Prior to the arrangement between Smith and Kissel, by which Smith terminated his interest in the contract, Smith assigned his interest therein, but Kissel had no notice thereof.

Held, that the arrangement between Smith and Kissel, by which the former released his interest in the property, was based upon a valuable consideration, and was binding upon Smith's assignee. SMITH v. KISSEL..... 235

4. — *Contract to complete a building within a specified time "under a penalty of twenty-five dollars per day" — when it is a penalty and when liquidated damages.* Where a building contract provides for the completion of the work "on or before the expiration of seventy-two working days * * * under a penalty of twenty-five dollars per day for every day thereafter, the presumption is that the amount was intended to represent a penalty or security for the actual damages and not liquidated damages.

If the loss of the use or rental value of the premises approximates the amount specified in the contract, it is fair to assume that, although specified as a penalty, it was intended as liquidated damages. SMALL v. BURKE.... 333

5. — *The owner should show the rental value.* The burden of showing that it was intended as liquidated damages rests upon the owner, and it is, therefore, incumbent upon him to show the rental value of the premises. *Id.*

6. — *Allowance for delay caused by changes ordered by the owner.* The following provision in such contract, "Should the owner at any time during the progress of the said buildings request any alterations, deviations, additions, or omission from the said contract he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract, as the same may be, by a fair and reasonable valuation," does not contemplate that, in determining the time which the contractor took to complete the work, he

CONTRACT — *Continued.*

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shall not receive any allowance for the time that he was delayed by changes, alterations or omissions ordered by the owner. *Id.*

7. — *Allowance for time spent in complying with sanitary and building laws.*] A provision in the contract requiring the contractor, at his own expense, to "comply with all sanitary laws, ordinances and rules, and all other orders of the Board of Health or other authorities affecting the cleanliness, safety, occupation and use of the said premises, and the sidewalk and the street in front of the same," does not impose upon the contractor the risk of delays arising from the fact that the plans and specifications violated the building laws and ordinances.

This provision of the contract must be limited to the work which the contractor undertakes to perform, and as between him and the owner he does not become an insurer of the sufficiency of the plans or assume any responsibility for delays caused by the interference of the authorities, owing to the fact that the plans and specifications had not been prepared in accordance with law or in conformity to the lawful requirements of the local authorities. *Id.*

8. — *What precludes a principal contractor from objecting to a sub-contractor's work.*] Where the principal contractor for the construction of a building, accepts the work of a sub-contractor, tenders it as a compliance with the principal contract, obtains the certificate of the owner's architect that the principal contract has been performed, and receives payment of the contract price, he is not in a position to say that the sub-contract was not completed in accordance with the terms and specifications of the original contract. GRAVES ELEVATOR CO. v. PARKER CO. 456

9. — *Effect of the architect's certificate.*] The architect's certificate that the principal contract had been satisfactorily performed, is a sufficient compliance with a provision of the sub-contract requiring the material and labor furnished by the sub-contractor to be satisfactory to the architect. *Id.*

10. — *Claim for extra work disallowed.*] What claim for alleged extra work performed by the sub-contractor should be disallowed, where neither the principal contractor nor the architect admitted it to have been extra work, but insisted that it be done as part of the work called for by the contract, considered. *Id.*

11. — *Continuing guaranty of the payment of notes — terminated by notice of revocation.*] If a person, who guarantees the payment of certain notes and of any renewals thereof, prior to the renewal of any of the notes, revokes the guaranty and notifies the bank, to whom the guaranty was given, to insist upon payment of the original notes at maturity, he will not be liable upon renewal notes thereafter accepted by the bank.

LINCOLN NATIONAL BANK v. FISCHER-HANSEN. 318

12. — *Proof of the advice of an attorney and of a prior declaration of an intention to revoke the guaranty is incompetent.*] Where the guarantor interposes this defense in an action brought against him by the bank upon a renewal note, and the bank denies having received notice of the revocation of the guaranty, it is improper to permit an attorney to testify that on the day the original notes fell due the guarantor consulted him in regard to his liability upon the guaranty and that he advised him to go at once to the bank and revoke his guaranty, for the purpose of corroborating the guarantor's testimony to the effect that after this interview with his attorney he went to the bank and gave the notice of revocation.

Such evidence is not competent under the rule that, when the testimony of a witness is attacked or sought to be impeached upon the ground that it is false and has been induced by a motive disclosed by the evidence, it may be shown to sustain his credibility that he made similar declarations at a time when no motive existed for falsifying.

The testimony of a witness that he did a certain thing cannot be corroborated by the testimony of another to whom he had previously declared his intention of doing it. *Id.*

— Agreement by a vendor of lands to repurchase the premises "at the end of three (3) years" — the vendee has a reasonable time thereafter in

CONTRACT — Continued.

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which to elect to reconvey — what is a reasonable time — a delay of five years — effect of a sale of part of the premises by the vendee.

MAIER v. REBSTOCK 587
See VENDOR AND PURCHASER.

— What instrument of subscription for stock of a corporation constitutes a contract with the parties to whom the stock was issued, and not with the corporation. *HUTCHINSON v. SIMPSON* 383
See CORPORATION.

— Mechanic's lien — it attaches, where the contractor fails, and the owner completes the building, to the amount remaining due after deducting the cost of completing the building.

NEW JERSEY STEEL & IRON CO. v. ROBINSON 436
See LIEN.

— Approval by the Attorney-General of a contract for the employment and compensation of attorneys and counsel by receivers — not compelled by mandamus. *MATTER OF CANDEE v. CUNNEEN* 71
See RECEIVER.

— *Deposit in bank.*
See BANKING.

— *Law relating to bonds.*
See BOND.

— *Relating to negotiable paper.*
See BILLS AND NOTES.

— *Damages recoverable for its breach.*
See DAMAGES.

— *Of insurance.*
See INSURANCE.

— *Of copartnership.*
See PARTNERSHIP.

— *Of sale of personal property.*
See SALE.

— *Specific performance.*
See SPECIFIC PERFORMANCE.

— *Of sale of real property.*
See VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE:

See NEGLIGENCE.

CORPORATION — *Action by stockholders in behalf of the corporation to recover stock alleged to have been improperly issued to parties engaged in its organization — what instrument of subscription for stock of the corporation constitutes a contract with the parties to whom the stock was issued, and not with the corporation — what does not create fiduciary relations between such parties and the corporation — any wrong done must be remedied in an action by the subscribers.* 1. The complaint in an action brought by stockholders of the American Malting Company against the corporation, the members of the brokerage firm of Moore & Schley and one Eicks, to compel Moore & Schley to account to the corporation for 5,000 shares of its preferred stock and 77,400 shares of the common stock, alleged that prior to the incorporation of the American Malting Company, Moore & Schley secured options for the purchase of a number of malting plants and caused such options to be taken in the name of the defendant Eicks, who was in their employ, for their benefit; that immediately prior to the organization of the corporation, Moore & Schley invited subscriptions to the stock thereof by the following letter:

" MESSRS. MOORE & SCHLEY:

" GENTLEMEN. — Each of the undersigned agrees to take the number of shares set opposite his signature hereto of the preferred stock and one-half that number of shares of the common stock of a company to be organized to manufacture and deal in malt with a capital of \$30,000,000, one-half thereof

CORPORATION — Continued.

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to be 7% cumulative preferred stock and the remainder common stock, and to pay therefor the amount likewise set opposite his signature to the Guaranty Trust Company of New York, at its office in New York City, as and when called for by said trust Company.

"It is expected that of the capital aforesaid all but two and one-half millions of preferred and one and one-quarter million dollars of common stock, to be reserved in the treasury for further corporate uses, will be issued in acquiring certain malt properties on which you and your associates hold options (or other value as you may determine in lieu of any thereof that may not be acquired) and for working capital and that a part of the stock so to be issued, to wit: nine million dollars of preferred and four and one-half million dollars of common heretofore underwritten, will be sold upon the terms above stated, deliverable when and if issued.

"Dated New York, *September 27th, 1897.*"

Signatures.	No. of Shares of Preferred Stock.	Prices.

The complaint further alleged that this letter was signed by a large number of persons who agreed to take the \$9,000,000 in preferred stock and \$4,500,000 in common stock therein mentioned and to pay therefor the sum of \$9,000,000; that Moore & Schley procured the American Malting Company to be incorporated with a capital of \$30,000,000, \$15,000,000 of which was preferred stock and \$15,000,000 common stock; that they also procured the election of officers and directors who acted in their interest; that thereafter, through the instigation of Moore & Schley, the corporation entered into a contract with Eicks, by which the latter agreed to convey or cause to be conveyed to the defendant corporation the malting plants on which options had been secured and to furnish a working capital of \$2,070,000, in consideration of which the corporation agreed to issue to Eicks or to his order preferred stock of the par value of \$12,500,000 and common stock of the par value of \$13,740,000; that the Guaranty Trust Company paid for the malting plants purchased from Eicks and also furnished the corporation with a working capital of \$2,070,000 out of the \$9,000,000 paid by the persons signing the subscription agreement above set forth; that there remained in the hands of the trust company 5,000 shares of preferred stock and 77,400 shares of the common stock which was delivered to Moore & Schley, who appropriated it to their own use. It was this stock for which the plaintiffs sought to compel the individual defendants to account to the corporation.

It was not alleged that Eicks failed to convey to the corporation the plants which he agreed to convey, nor that such plants were not worth what the company paid for them. No attempt was made to rescind the sale of the plants to the corporation.

Held, that the complaint did not state a cause of action against the individual defendants, as, upon the facts alleged, the corporation, in whose right the plaintiffs sued, could not itself maintain the action;

That the corporation had no interest in the subscription agreement which was the foundation of the cause of action which the plaintiffs had attempted to set up;

That no fiduciary relation existed between Moore & Schley and the corporation, which would entitle the latter to maintain the action;

That if a wrong had been done, it was one which would be remedied only at the suit of those who signed the subscription agreement or those claiming directly under them. HUTCHINSON v. SIMPSON.....

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2. — *Railroad bonds registered in the name of a charitable corporation — the registration changed to bearer under an unauthorized transfer by its treasurer and a forged resolution — liability to the charitable corporation of the railroad company and of a brokerage house which witnessed the transfer — liability of the brokerage house to the railroad company.* A railroad company issued

CORPORATION — Continued.

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coupon mortgage bonds payable to bearer. The bonds and the mortgage given to secure their payment authorized the owner to register the bonds in his name, and provided that, if so registered, they would thereafter be transferable only upon the books of the company by the owner in person or by his attorney duly authorized. Provision was also made for a change in the registration of the bonds so that they should again become payable to bearer.

A charitable corporation purchased three of the bonds and procured them to be registered in its name. Thereafter, the treasurer of the charitable corporation who was the custodian of the bonds, but who had no authority, actual, implied or apparent, to sell the bonds, without the knowledge of the charitable corporation, abstracted the bonds from the place in which they were kept, went to the office of a brokerage firm and told the cashier thereof that the charitable corporation desired to sell the bonds. The cashier told the treasurer that the bonds could not be sold unless they were registered as payable to bearer and instructed the treasurer to take the bonds to the transfer agent of the railroad company and ascertain how the change in registration could be effected.

Thereupon the treasurer called upon the transfer agent of the railroad company and was informed that it was necessary to furnish to the railroad company a power of attorney executed by the charitable corporation with the signature thereof guaranteed by a firm represented on the New York Stock Exchange and also a copy of the resolution of the board of directors of the charitable corporation authorizing the transfer.

On communicating these facts to the cashier of the brokerage firm, the latter filled out a power of attorney authorizing the transfer of the bonds to bearer. The treasurer of the charitable corporation signed the power of attorney on behalf of the charitable corporation in his capacity as treasurer and it was witnessed by the cashier of the brokerage firm. One of the members of the brokerage firm also signed the power of attorney with the firm name. The treasurer then produced a forged resolution of the board of directors of the charitable corporation authorizing the transfer of the bonds.

The power of attorney and the forged resolution were taken to the transfer agent of the railroad company who thereupon registered the bonds as payable to bearer. The bonds were then delivered to one of the members of the brokerage firm who sold the same and received the proceeds thereof. He turned the proceeds of such sale over to the treasurer of the charitable corporation and the latter appropriated them to his own use.

Held, that, when the bonds were registered in the name of the charitable corporation, the negotiability thereof was destroyed, and that, until the charitable corporation, or its duly authorized agent, transferred them or procured them to be registered as payable to bearer, the bonds occupied the same status as any other non-negotiable obligation of the railroad company;

That the acts by which the change in the registration of the bonds had been effected, having been done without the authority of the charitable corporation, there had been, as between the charitable corporation and the railroad company, no change in the ownership of the bonds, and that the charitable corporation was entitled to recover from the railroad company the bonds themselves or their value;

That the railroad company, in case it furnished such bonds or paid the value thereof, was entitled to recover their value from the brokerage firm.

That the charitable corporation was also entitled to recover the value of the bonds from the brokerage firm.

CLARKSON HOME v. CHESAPEAKE & O. R. Co. 491

— Action against directors of a corporation to recover damages for alleged false representations—motion to make the complaint more definite and certain by alleging which of the defendants were directors at the respective times when the representations were made—bill of particulars.

VINER v. JAMES. 543
See PLEADING.

— Injunction sought by a majority stockholder, restraining the directors of a corporation, minority stockholders, from holding a special meeting or disposing of its assets—when it will not be granted. GILLETTE v. NOYES. 313

See EQUITY.

See RAILROAD.

CORROBORATION :

See EVIDENCE.

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COSTS — *On appeal from a judgment of a justice of the peace.*] 1. An action was brought in a Justice's Court to recover \$116 for merchandise sold and delivered by the plaintiff to the defendant. The latter interposed a counterclaim of \$125 for damages resulting from an alleged misrepresentation as to the quality of the merchandise. The trial in the Justice's Court resulted in a judgment for the plaintiff for \$116 and costs. The defendant appealed to the County Court and demanded a new trial therein. He also served an offer to allow the plaintiff to take judgment against him for \$65, which offer the plaintiff did not accept. The case was tried three times in the County Court, the third trial resulting in a verdict for the plaintiff for \$75.

Held, that as it did not appear that the verdict of seventy-five dollars included interest, interest should not be computed on the amount of the plaintiff's offer of judgment, from the time when it was made to the rendition of the verdict, for the purpose of determining whether the verdict was more favorable to the plaintiff than the offer of judgment;

That, interest not being added to the amount of the offer, the plaintiff's recovery was more favorable to him than the offer of judgment and that, consequently, the defendant was not entitled to costs under section 3070 of the Code of Civil Procedure;

That the plaintiff was not entitled to costs under section 3070 of the Code of Civil Procedure, but that, as he had recovered fifty dollars or more in the County Court, he was entitled to costs under section 3228 of the Code of Civil Procedure. *ROSE v. WELLS*..... 75

2. — *When interest is considered in determining whether a recovery is more or less than an offer.*] In actions where the damages are liquidated, interest from the date of the offer to the date of the recovery should be taken into consideration in determining whether the recovery is more favorable than the offer.

In actions where the damages are unliquidated, the recovery should be compared with the offer without adding interest to the offer or discounting the amount of the recovery. *Id.*

3. — *When imposed upon an executor individually.*] As a general rule, if an executor denies the existence of assets and such assets appear he will be personally charged with costs.

MATTER OF L. I. L. & T. CO. (IN RE NORTHP)..... 5

— Amendment, by bringing in an additional defendant — costs, where the case has gone to the Court of Appeals on the question as to the necessity of so doing. *STEINBACH v. PRUDENTIAL INSURANCE CO.*..... 440
See PLEADING.

— *Payment of, imposed on granting leave to amend a complaint.*
See PLEADING.

COUNSEL FEE — *Awarded in an action for separation.*

See HUSBAND AND WIFE.

COUNTY — Publication of election notices — effect of more than one paper being designated by the board of supervisors — in fixing the compensation therefor, the supervisors are not limited by the prices fixed by section 21 of the County Law. *MATTER OF FORD v. SUPERVISORS*..... 119
See ELECTION.

COURT — *At an election held on November third a vacancy in the office of justice of the Supreme Court occurring on the previous August third may be filled.*
See PEOPLE EX REL. HART v. GOODRICH..... 445

— *Quere, as to the right of the Appellate Division, upon an appeal from a judgment of the Court of Claims, to modify such judgment by increasing the award.*

See HALL v. STATE OF NEW YORK..... 96

— *General Rule of Practice 86.*

See McMANN v. BROWN..... 249

See FISHER MALTING CO. v. BROWN..... 251

COURT OF CLAIMS — *Right of the Appellate Division to modify its judgment.* PAGE.

See COURT.

COVENANT — Prohibiting the erection of a tenement house on land conveyed — an apartment house does not come within the prohibition.

KITCHING v. BROWN..... 160

See VENDOR AND PURCHASER.

CREDITOR'S SUIT — *To set aside a fraudulent conveyance.*

See FRAUDULENT CONVEYANCE.

See EQUITY.

CRIME — *Receiving stolen money — delivery to an attorney by his client (the thief) of money which the attorney deposits to his credit in a bank — proof that the attorney failed to deliver it to a receiver of the thief's property — the thief was not an accomplice of his attorney — extent to which the evidence of the thief, if an accomplice, must be corroborated — declaration of the attorney as to the thief's methods — reiteration of a charge not required.* 1. Upon the trial of an indictment charging the defendant with the crime of receiving \$30,500 which one Miller had stolen, it appeared that the defendant was Miller's attorney and was familiar with the methods by which Miller obtained the money in question; that on one occasion Miller came to the defendant's office with the \$30,500 in a satchel and that the defendant advised him to flee from the country; that the defendant and Miller, the defendant carrying the satchel, then went to a banking house where Miller had a bank account of \$10,000 and a deposit of \$100,000; that on reaching the banking house, Miller attempted to withdraw the deposit of \$100,000, but was unsuccessful, as it was after banking hours; that Miller finally determined to transfer his account and the deposit to the defendant; that in the meantime the \$30,500 was handed to the receiving teller of the bank to be counted; that after the receiving teller had counted the money, the defendant prepared three deposit slips, one for the certificate of deposit of \$100,000, one for a check of \$10,000 signed by Miller to the order of the defendant, and one for the \$30,500 in cash. These slips were handed to the receiving teller with the money that had been brought to the bank by the defendant. The certificate of deposit, the check and the money were placed to the defendant's credit in the bank and were subsequently withdrawn by him.

Held, that the evidence was sufficient to sustain a finding that the defendant received the \$30,500;

That Miller never parted with his title to the money until, with his consent, it was transferred to the defendant and by the latter deposited with the bank;

That proof of the defendant's failure to pay any of the money and property received by him from Miller either to the receiver of Miller's property appointed by the Supreme Court or to Miller's receiver in bankruptcy, was competent as evidence characterizing the knowledge and intent with which the defendant received such money;

That Miller, in delivering the money to the defendant, did not become an accomplice of the defendant;

That, assuming that Miller was an accomplice of the defendant, it was not necessary that all of Miller's testimony, except that which was corroborated, should be disregarded when determining whether the defendant was innocent or guilty;

That sufficient corroborative evidence had been given to satisfy the requirements of section 399 of the Code of Criminal Procedure, providing that "a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime;"

That any declaration or admissions of the defendant, in relation to the methods by which Miller obtained the stolen moneys, were competent evidence as to the defendant's knowledge of such methods;

That a judge is not bound to reiterate to the jury instructions which he has already distinctly given to the jury. **PEOPLE v. AMMON**..... 205

2. — *Manslaughter — unnecessary force used in self-protection — if that force did not cause the death a conviction is improper — proof that the deceased had one knife does not disprove his possession of another — a charge, in effect, that a preponderance of evidence establishes guilt beyond a reasonable doubt.*

CRIME — Continued.

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Upon the trial of an indictment under which the defendant was convicted of the crime of manslaughter in the second degree, it appeared that the deceased died as the result of injuries received in an altercation with the defendant which the defendant claimed, and there was no proof to the contrary, had been started by the deceased attacking him with a knife. No single injury received by the deceased was sufficient of itself to cause death, which resulted from a shock caused by all the injuries taken together. The evidence did not establish how much force the defendant used.

Held, that even if the defendant had used more force than was necessary to defend himself from the assault, it not having been shown beyond a reasonable doubt that such extra force, which was the only force unlawfully used, resulted in the death of the deceased, the defendant could not be convicted of manslaughter;

That evidence that during the time that it was claimed that the deceased owned the knife, with which the defendant contended the deceased began the assault, a witness had seen him in possession of another knife, was immaterial, as it did not follow from the deceased's possession of the other knife that he did not have the knife in question;

That a charge that the People were bound to satisfy the jury "by a preponderance of evidence of the guilt of the defendant, and when they do satisfy you of that, it should be your province and duty to bring the defendant in guilty," was erroneous, as the People were bound to prove the defendant's guilt beyond a reasonable doubt;

That the error was not cured by a further charge to the following effect: "The People do not ask you to find a verdict on insufficient evidence, and unless you believe that the case is proven beyond any reasonable doubt you must acquit. What we mean by reasonable doubt is not a speculative doubt as to what a person might have done, but such a reasonable doubt as an ordinarily reasonable man would have after looking the entire transaction over, and the defendant is entitled to the benefit of such a doubt at every turn of the case." *PEOPLE v. TAYLOR*..... 29

— *Of contempt.*

See CONTEMPT.

CRUELTY — Between husband and wife.

See HUSBAND AND WIFE.

DAM — *What continuity of use of a dam is sufficient to establish a prescriptive right to flood land, and is inconsistent with an intention to abandon that right.*

See ADVERSE POSSESSION.

DAMAGES — *Removal of steel beams from a building existing on real property at the time of the execution of a mortgage thereon — right of the mortgagee to sue therefor without alleging insolvency on the part of the mortgagor — measure of damages — when it is the cost of restoration and when the diminution in market value.*

See *OGDEN LUMBER CO. v. BURSE*..... 143.

— *Warranting a "machine to do good work, to be well made, of good materials, and to be durable if used with proper care" — the vendor is not liable for personal injury caused to the vendee by the breaking of the gearing while in use — general and special warranty, distinguished — measure of damages.*

See *BIRDSINGER v. MCCORMICK HARVESTING M. CO.*..... 35

— *Contract to complete a building within a specified time "under a penalty of twenty-five dollars per day" — when it is a penalty and when liquidated damages — the owner should show the rental value — allowance for time spent in making alterations and in complying with sanitary and building laws.*

See *SMALL v. BURKE*..... 338

— *Electric plant — when it is a nuisance in a city — character of the neighborhood considered — obstruction of the street by ashes — that it could not be otherwise operated is no defense — measure of damages of the lessee of an adjoining hotel.*

See *PRITCHARD v. EDISON EL. ILLUMINATING CO.*..... 178

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— *Measure of damages for a failure to deliver goods contracted for—the difference between their market value and the contract price; between their value to the vendee and the contract price.*

See IDEAL WRENCH CO. v. GARVIN MACHINE CO. 187

— *Profits from the unlawful use of a printing press, the subject of a monopoly—burden of proof as to the profits—the damages being unliquidated interest is not allowable.*

See NEW YORK BANK NOTE CO. v. HAMILTON CO. 427

— *Negligence—a disease for which damages are sought must necessarily and directly be caused by the injury.*

See LOCKWOOD v. TROY CITY RAILWAY CO. 113

— *Liability of a carrier for damages to goods occurring after possession thereof has been demanded.*

See THYLL v. NEW YORK & LONG BRANCH R. R. CO. 513

DEBTOR AND CREDITOR — *Trust giving the beneficiary the right, on notice to the trustee that he desires to use the trust fund in his business, to have such principal—the title to the trust fund, whether real or personal, vests in the beneficiary—creditor's action to enforce a judgment against the fund—when the fact that residuary legatees are not made parties is not a ground of objection—burden of proof that they are alive.*

See ULLMAN v. CAMERON 91

— *Fraternal beneficiary corporation of the State of Indiana—attachment by a beneficiary of a "relief fund" deposited in bank in the State of New York—right thereto of the attaching beneficiary as against receivers of the corporation appointed in Indiana and in New York—such fund is not impressed with a trust.*

See NATIONAL PARK BANK v. CLARK 262

— *Action by a trustee in bankruptcy against a judgment creditor of the bankrupt—an adjudication in the bankruptcy proceeding that the bankrupt was insolvent when the judgment was obtained against him, is conclusive against the judgment creditor.*

See DE GRAFF v. LANG. 564

— *Creditor of a defendant in an action to foreclose a mortgage on real property is not, by virtue of such relation, entitled to intervene in the action.*

See BOUDEN v. LONG ACRE SQUARE BUILDING CO. 325

— *Fraudulent conveyance by a debtor.*

See FRAUDULENT CONVEYANCE.

DEED — *Covenant prohibiting the erection of a tenement house on land conveyed—an apartment house does not come within the prohibition.*

KITCHING v. BROWN. 160

See VENDOR AND PURCHASER.

See REAL PROPERTY.

DEFAULT — *Failure of the Comptroller to appear on a motion for a writ of certiorari to review his refusal to revise a franchise tax.*

See TAX.

DEFINITION — *"New Haven harbor and adjacent inland waters"—construction of a restriction thereto in a marine insurance policy.*

See KIRK v. HOME INSURANCE CO. 26

— *"Visible marks" in an accident insurance policy—pallor, emaciation and decline constitute "visible" marks.*

See INSURANCE.

— *"Excess," as used in the question, "Have you ever used liquor to excess?"*

See INSURANCE.

DELIVERY — *Of goods sold.*

See SALE.

DEMAND — *When necessary to set interest running on an award.*

See EMINENT DOMAIN.

DEMURRER:

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DEPOSIT — *In bank.*

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DEPOSITION — Injunction sought by a majority stockholder, restraining the directors of a corporation, minority stockholders, from holding a special meeting or disposing of its assets—the complaint and moving affidavits verified on information and belief, not stating the sources thereof, are insufficient. *GILLETTE v. NOYES*..... 318
See EQUITY.

DISMISSAL — *Of an action for a failure to prosecute it — when it is proper.*

See McMANN v. BROWN 249

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DIVORCE:

See HUSBAND AND WIFE.

ELECTION — *When the inspectors and poll clerks have not performed their duty a peremptory writ of mandamus directing a recount and canvass of the votes is proper — the existence of a remedy by action does not prevent its issue — mere irregularities not affecting the result do not call for it — the common-law powers of the court are not taken away by the statutory authority as to mandamus — what statements are insufficient as denials.]* 1. A candidate at a town election for the office of supervisor who, upon the face of the returns had been defeated by one vote, made a motion for a peremptory writ of mandamus to compel a recount and canvass of the votes cast in one of the election districts. He alleged that the canvass in said district "was not conducted in the manner prescribed by the statute, in that the chairman of the board of inspectors did not take the split ballots separately and announce the vote for each candidate on each such ballot in the order of the offices printed thereon, and the poll clerks did not make any tally of the same; nor was* any of the split ballots passed to the other inspectors for verification; but the split ballots were read off by one of the inspectors * * * who was not the chairman, and they were tallied by inspectors" and not by the poll clerks; that the tally sheet in said district "is not filled out in the manner required by law in that it does not contain opposite the name of Joel Brink (the relator) or any other candidate on the Republican ticket under a column headed 'Number of votes cast and counted for each candidate on straight ballots' an entry of the number of straight party votes counted; nor does it contain under another column headed 'Number of votes cast and counted for each candidate on split ballots' entered by single marks grouped into five marks, the votes canvassed for said Joel Brink for the office of supervisor, but instead thereof there appears in such column the words 'Eleven votes' written in such column over something which has been erased therefrom."

The answering affidavits did not raise an issue of fact as to these allegations.

The relator, who was credited with having received but eleven votes in said district, produced the affidavit of fourteen persons to the effect that they had voted for him. It was not questioned but that the ballots had been preserved inviolate and that they could be recounted and canvassed under the same conditions that existed at the time of the original count.

Held, that as the vote was not counted or returned in accordance with the statute, it was proper for the Special Term, in its discretion, to order that a peremptory writ of mandamus issue directing a recount and canvass of the vote;

That the rule that a mandamus will not be granted where a party has a remedy by action, is one addressed to the sound discretion of the court and is not of universal application;

That as a general rule mere irregularities in the mode of canvassing a vote at an election and making a return thereof will not vitiate the election;

* *Sic*.

ELECTION — Continued.

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That if the irregularities are the result of ignorance or inadvertence and they do not affect the result of the election, the court may refuse to take action for the purpose of compelling a recanvass of the vote in the specific manner directed by the statute;

That until the inspectors and poll clerks have canvassed the vote in the manner provided by statute, they have not performed the duty imposed upon them as ministerial officers;

That the statutory provisions authorizing proceedings by mandamus in election cases do not divest the court of its common-law jurisdiction to issue a writ of mandamus commanding the inspectors of election to convene and perform their duties as prescribed by statute;

That indefinite general statements, or mere conclusions of law or fact contained in the answering affidavits, were not sufficient, as denials, to raise an issue of fact. *PEOPLE EX REL. BRINK v. WAY*..... 82

2. — *At an election held on November third a vacancy in the office of justice of the Supreme Court occurring on the previous August third may be filled.*] Under section 4 of article 6 of the Constitution of the State of New York, which provides, "When a vacancy shall occur otherwise than by expiration of term in the office of justice of the Supreme Court, the same shall be filled for a full term, at the next general election, happening not less than three months after such vacancy occurs," a vacancy in the office of justice of the Supreme Court occurring on August 3, 1896, may be filled at a general election held on November 3, 1896. *PEOPLE EX REL. HART v. GOODRICH*. 445

3. — *Publication of election notices.*] Under section 23 of the County Law (Laws of 1892, chap. 686) the board of supervisors of a county are authorized to direct the publication of the election notices in but two newspapers, one representing each of the two principal political parties.

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4. — *Effect of more than one paper being designated by the board of supervisors.*] An attempt by the members of the board of supervisors to designate for this purpose four papers for each of the two principal political parties is not valid as to the paper first mentioned in each of the respective lists, but is void as to all of the papers so designated, and no resolution revoking the designation is necessary. *Id.*

5. — *In fixing the compensation therefor, the supervisors are not limited by the prices fixed by section 21 of the County Law.*] Section 21 of the County Law, relative to the publication of the Session Laws, provides: "The expense of such publication * * * in counties not having a city of over fifty thousand inhabitants shall not be less than twenty nor more than fifty cents per folio, and in other counties not less than thirty nor more than fifty cents per folio; the specific rate in either case to be fixed by the board of supervisors."

Section 22, relating to the publication of election notices, provides: "Such boards, except in the counties of Erie and Kings, shall, in like manner, designate two newspapers, representing respectively each of the two principal political parties into which the electors of the county are divided, in which shall be published the election notices issued by the Secretary of State, and the official canvass, and fix the compensation therefor, which shall be a county charge."

Held, that the phrase, "in like manner," contained in section 22, only relates to the designation of the newspapers in which the election notices shall be published, and not to the fixing of the compensation for the publication of such notices;

That the board of supervisors, in fixing the compensation for the publication, is not limited by the rates fixed by section 21 for publishing the Session Laws. *Id.*

See OPTION.

EMINENT DOMAIN — *Land taken to extend Riverside drive in New York city — award embracing the value of the land and interest thereon to the date of the report — the landowner is entitled to interest on the entire award.*] 1. Commissioners of estimate and assessment appointed in a proceeding instituted under chapter 665 of the Laws of 1897, for the extension of Riverside drive

EMINENT DOMAIN — Continued.

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in the city of New York, awarded a landowner \$11,500 as the value of the land taken, and also the further sum of \$1,508.41 as interest thereon from September 22, 1900, the date when the title vested in the city, to November 29, 1902, the date of the report, making a total of \$13,008.41. April 23, 1903, after the report of the commissioners had been confirmed, the property owner filed a demand for the payment of the award.

Held, that the landowner was entitled to receive \$13,008.41, with interest thereon from November 29, 1902, the date of the report, to the time when payment was made, and not simply \$11,500, with interest thereon from September 22, 1900, the date when the title vested in the city, to the time when the report was confirmed;

That the amount designated as interest in the award made to the property owner was not awarded to her as such, but as a part of the damages which she had sustained, and that consequently she was entitled to interest on the entire award. *MATTER OF CITY OF N. Y. (IN RE DORSETT)* 523

2. — *When the rule that an excessive demand is ineffectual to set interest running does not apply.*] *Seem*, that the rule that an excessive demand is ineffectual to set interest running upon the sum actually due is of doubtful application where the whole amount of money which the party is entitled to receive is liquidated and the only question relates to interest. Under such circumstances, if the comptroller deems the demand excessive, he should offer to pay the sum concededly due. *Id.*

3. — *Telephone poles on a rural highway — they constitute an added burden on the fee thereof — injunction.*] The erection of a telephone line on a public highway, not within the bounds of a city or village and the fee of which is in the abutting owners, imposes an added burden upon the highway and if the telephone company attempts to construct the line without obtaining the consent of the abutting owners, or instituting condemnation proceedings, the abutting owners are entitled to injunctive relief.

GRAY v. YORK STATE TELEPHONE CO. 89

— Condemnation of land — what continuity of use of a dam is sufficient to establish a prescriptive right to flood land, and is inconsistent with an intention to abandon that right. *HALL v. STATE OF NEW YORK* 96

See ADVERSE POSSESSION.

EMPLOYER AND EMPLOYEE:

See MASTER AND SERVANT.

EQUITY — *Action for specific performance of a contract and in default thereof for its revocation and the restoration of the parties to their previous condition — who are proper parties to such an action — when the complaint states a cause of action — allegation as to inadequate remedy at law.*] 1. The complaint in an action brought by the International Paper Company against the Hudson River Water Power Company, the Morton Trust Company, the Trust Company of America, the Kanes Falls Electric Company, and the Hudson River Electric Company, alleged that the plaintiff, desiring to develop a water power for use in connection with its pulp and paper mills, purchased certain properties and river rights along the Hudson river; that during the same time the defendant the Kanes Falls Electric Company and one Ashley, the president of that company, had acquired and were attempting to acquire other property along the river in hostility to the plaintiff; that the plaintiff and the defendant Kanes Falls Electric Company entered into a contract by which they agreed to co-operate in purchasing and acquiring all the property rights necessary to the development of the water power between certain points, and to divide said properties and the cost of obtaining them between the parties in certain specified proportions; that there should be conveyed to the Kanes Falls Electric Company that part of the properties known as the "upper power," and that there should be conveyed to the plaintiff that part of the premises known as the "lower power;" that in November, 1899, the parties to the contract had acquired all the properties connected with the "upper power" and the greater portion of the properties connected with the "lower power," and that the money required for purchasing said properties had been chiefly, if not entirely, advanced by the plaintiff; that the Hudson River Electric Company and the Hudson River Water Power Company were

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thereafter organized by Ashley, and that Ashley desired to obtain title to the "upper power" in order to convey it to the Hudson River Water Power Company; that a further contract was made between the Kanes Falls Electric Company and the plaintiff which recited that the Kanes Falls Electric Company was about to deliver to the plaintiff a deed of the "lower power," and that the plaintiff was about to deliver to the Trust Company of America a deed to the Kanes Falls Electric Company of the "upper power," said last-mentioned deed to be held by the trust company subject to the payment of \$125,000 by the Kanes Falls Electric Company; that \$90,000 of said \$125,000 should be, upon its receipt, paid by the trust company to the plaintiff, and that the remainder of \$35,000 should be held by the trust company until the accounts between the parties were settled; that pursuant to the contract, and in reliance upon the agreement on the part of Ashley and the Kanes Falls Electric Company to assist the plaintiff in procuring the remainder of the properties necessary to complete the "lower power," the plaintiff executed a deed conveying all of the "upper power" to the Kanes Falls Electric Company, and that the latter company thereupon conveyed the same to the defendant Hudson River Water Power Company, which received the conveyance with full knowledge of the agreement to assist the plaintiff in acquiring the properties necessary to complete the "lower power;" that at the time of the conveyance by the plaintiff to it, the Kanes Falls Electric Company executed a conveyance to the plaintiff of the properties then owned by it connected with the "lower power;" that the plaintiff was unable to procure the properties necessary to complete its title to the "lower power" by reason of the fact that the Kanes Falls Electric Company and Ashley wrongfully and in disregard and violation of their contracts, acquired such properties and conveyed them to the Hudson River Electric Company, which last-mentioned company refused to convey the same to the plaintiff; that the Hudson River Electric Company had executed a mortgage to the defendant Morton Trust Company, by which it conveyed to said trust company, together with other properties, the properties connected with the "lower power" as security for the payment of certain bonds; that none of the bonds had been actually issued for value; that the Hudson River Electric Company took title to the properties connected with the "lower power" with full knowledge of the contracts between the plaintiff and the Kanes Falls Electric Company; that it refused to convey such properties to the plaintiff, although the plaintiff had offered to repay to it the consideration paid for said properties, and that the properties in question were necessary to a full development of the "lower power."

The relief demanded was as follows:

First. That the court ascertain the cost to the defendant Hudson River Electric Company of the properties described in the complaint.

Second. That the Hudson River Electric Company be decreed to convey the properties described in the complaint to the plaintiff upon payment by the plaintiff of its proportion of the sums actually paid therefor.

Third. That the Kanes Falls Electric Company be required to pay the remainder of the amount so paid for said properties.

Fourth. That the amount so paid by the plaintiff and by the Kanes Falls Electric Company be paid to the Morton Trust Company and that said trust company on receipt of said amounts, be required to execute and deliver to the plaintiff a release of said properties from the lien of their said mortgage.

Fifth. That in lieu thereof the defendants the Hudson River Water Power Company and the Trust Company of America, as trustee, be decreed to reconvey to this plaintiff all the property connected with the upper power, conveyed to the Kanes Falls Electric Company by the plaintiff, upon the payment into court by the plaintiff of said sum of \$90,000, with interest thereon and the conveyance by it to the defendant the Kanes Falls Electric Company of such properties as had been acquired by it prior to the making of said deed.

Sixth. For such other relief as may be just and proper in the premises.

The defendants the Hudson River Water Power Company, the Morton Trust Company and the Trust Company of America interposed separate demurrers to the complaint on the following grounds:

First. That it does not state facts sufficient to constitute a cause of action against the defendant demurring.

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Second. That causes of action are improperly joined in this action.

Held, that the demurrers should have been overruled;

That the complaint set forth with sufficient definiteness facts enabling a court of equity to grant equitable relief;

That it appearing from the facts alleged that an action at law would give but an inadequate and imperfect remedy to the party aggrieved, it was not necessary that the complaint should allege that the plaintiff had no adequate remedy at law;

That the Morton Trust Company, which was the trustee mentioned in the mortgage given by the Hudson River Electric Company, was a proper party to the action, although none of the bonds secured by the mortgage had been issued for value, as the mortgage was an outstanding incumbrance and some of the bonds might have been issued, although not for value;

That the defendant the Trust Company of America, to whom the deed to the Kanes Falls Electric Company had been delivered in escrow, and which still held \$5,000 subject to the direction of the plaintiff and the Kanes Falls Electric Company, was a proper party to the action, although no specific relief was asked against it;

That the Hudson River Water Power Company would not be a necessary or proper party defendant if the action were brought solely to secure specific performance of the contracts, but that, as it was also brought to obtain a rescission of the contract and a reconveyance of the property transferred pursuant to the contracts, if, for any reason, specific performance could not be decreed, the Hudson River Water Power Company was a proper party;

That there was no reason why such alternative relief should not be demanded in the same action, and why the persons affected by either relief should not be made parties thereto, it appearing that the same transactions were to be considered, and that the principal part of the proof for the purpose of obtaining either relief was the same.

INTERNAT. PAPER CO. v. HUDSON RIVER CO. 56

2. — *Parties to an action for specific performance.*] In an action for specific performance all persons having or claiming an interest in the land derived from the vendor after the contract and with notice thereof are necessary defendants in a suit brought by the vendee or his representative. *Id.*

3. — *Parties to an action in equity.*] In equity all persons materially interested, either legally or beneficially, in the subject-matter of a suit are to be made parties to it, so that there may be a complete decree which shall bind them all.

It is not essential in a suit in equity that all the parties should be interested in the same way or affected alike by the judgment demanded. It is proper to unite all the parties interested to avoid a multiplicity of suits and have an adjudication that will determine the question as to all parties interested in the subject-matter. *Id.*

4. — *Presumption on demurrer.*] In considering a pleading demurred to it should be held to allege all facts that can be implied from the allegations by reasonable and fair intendment. *Id.*

5. — *Tender in equity.*] Where in an action in equity the amounts to be paid by either party to the other are uncertain and subject to an accounting between the parties, it is enough to offer in the complaint to pay or to perform whatever obligations rest upon the party bringing the action. *Id.*

6. — *Specific performance or rescission — it is discretionary.*] The right to specific performance of a contract or its rescission rests in judicial discretion, and may be granted or withheld upon a consideration of all the circumstances and in the exercise of sound discretion. *Id.*

7. — *An objection that the issues in an action are triable at law and not in equity cannot be first taken on appeal.*] Where two defendants sued by the former owner of certain bonds issued by one of such defendants, a railroad company, and sold by the other defendant, a stockbroker, each answer the complaint and the railroad company asks affirmative relief against the stockbroker and the case is tried upon the issues so formed as an equity case with-

EQUITY — Continued.

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out objection by either defendant, it is too late upon appeal for either defendant to insist that the question of the liability of the defendants to the plaintiff or of the stockbroker to the railroad company presented a legal liability which could only be enforced in an action at law.

CLARKSON HOME v. CHESAPEAKE & O. R. Co. 491

8. — *Temporary injunction — the complaint and moving affidavits verified on information and belief not stating the sources thereof, are insufficient.*] The plaintiff in an action will not be granted a temporary injunction where the allegations of the complaint and the statements contained in the moving affidavit are made either upon the plaintiff's understanding or upon his information or belief, and neither the basis of his understanding nor the sources of his information nor the grounds of his belief are stated.

The defect is not cured by a joint affidavit of other persons, which, when applied to the allegations of the complaint and to the plaintiff's affidavit, merely operates as an averment that it is true that the plaintiff's understanding, information and belief are as alleged and stated.

GILLETTE v. NOYES. 313

9. — *Injunction sought by a majority stockholder, restraining the directors of a corporation, minority stockholders, from holding a special meeting or disposing of its assets.*] When, in an action brought by a person owning a majority of the stock of a corporation against the corporation and certain individuals, who, although minority stockholders, constitute a majority of the board of directors of the corporation, a temporary injunction should not be granted restraining the individual defendants from holding a special meeting of the board of directors and from disposing of any of the assets of the corporation until the final determination of the action, considered. *Id.*

10. — *Equity — specific performance, when granted.*] Courts of equity have jurisdiction to entertain an action for and decree specific performance of a contract for the sale of a chattel or of a chose in action agreed to be transferred. Parties, however, may not demand as matter of absolute right specific performance of such a contract. Whether it will be granted in a given case rests in the sound discretion of the court. Such discretion will be favorably exercised when it is made to appear that compensation in damages is difficult, or impossible of establishment, and that the legal remedy available is consequently inadequate. GILBERT v. BUNNELL. 284

11. — *What must appear by the complaint.*] Mere statements in the complaint that damages for the breach cannot be established; that difficulty attends upon making proof of damages sustained and that the plaintiff will be unable to prove the sum, or does not know what such damages are, and can only have full and adequate relief by a decree of specific performance, do not make out a case entitling the party to equitable relief. The transaction, as averred, and the facts as they appear in connection with it, must be of such a character as to make it apparent to the court that the exercise of equitable jurisdiction is necessarily essential in order to afford to the party the relief to which he is entitled, and that without it he will be shorn of the benefits of his contract or a substantial part thereof. *Id.*

12. — *What does not show that the monetary value of a contract cannot be determined — when a complaint asking equitable relief should be sent to the law side of the court — quære in case of a demurrer thereto.*] The complaint in an action alleged that the defendants agreed to sell to the plaintiffs certain participating subscription rights in an underwriting syndicate of the par value of \$10,000, such sale to be evidenced by a written assignment from the defendants to the plaintiffs; that the plaintiffs had been, at all times, willing to fulfill the contract, but that the defendants had refused to execute the contract transferring such rights. The complaint then alleged the character of the underwriting syndicate, its method of transacting business, the value of the subscription rights and the substantial value of the rights which the defendants had agreed to transfer.

It further charged that under such rights the defendants had received the sum of \$1,250 returned to them as a part of their subscription to which the plaintiffs were entitled, and also the further sum of \$1,000, declared as dividends and paid by the syndicate to the defendants in amounts of \$500 each. The complaint further averred that said subscription rights were limited in

EQUITY — *Continued.*

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number and could not be purchased in the open market; that the underwriting syndicate was still in existence and that very large profits to it would be realized; that the value of such subscription was very great, but that the amount thereof was conjectural and unknown to the plaintiffs; that there was no basis upon which damages for the breach could be predicated; that what the profits were or would be was unknown to the plaintiffs, and that by reason thereof the plaintiffs had no adequate remedy at law in a recovery of damages for the breach; that the only remedy which would give to the plaintiffs the rights to which they were entitled was by a specific performance of the contract; that upon the execution of the contract with the defendants the plaintiffs agreed to sell and transfer such right to another party and that by reason of defendants' failure to fulfill their contract plaintiffs were unable to fulfill their subsequent contract, in consequence of which they would be subjected to heavy damages.

The relief demanded was that the defendants be required to execute a written assignment of the subscription rights; that they be enjoined and restrained from selling or otherwise disposing of such subscription rights; that the plaintiffs have a money judgment for the several sums of money which the defendants had received on account of such rights and for such other and further relief as might be proper.

An answer was served and, upon the case being brought on for trial at an Equity Term of the court, the trial judge dismissed the complaint on the ground that, under the complaint, the plaintiffs were not entitled to equitable relief.

Held, that the complaint did not entitle the plaintiffs to equitable relief, as there was no more difficulty in establishing the money value of the contract sued upon in this action than in any ordinary case where the value of the contract depended upon the profits to be made therefrom;

That the complaint stated a cause of action at law for a breach of contract;

That it was, therefore, improper, an answer having been interposed and the case having been brought to trial, for the court to dismiss the complaint, but that it should have been sent to the law side of the court.

Quare, if, upon the hearing of a demurrer to a complaint framed to secure equitable relief, it appears that the complaint states a cause of action at law but not a cause of action in equity, whether the court should dismiss the complaint. *Id.*

— An action is not maintainable by an administrator on a note deposited with a trust company pursuant to section 2595 of the Code of Civil Procedure—a creditor's action cannot be based on a judgment so obtained—the fact that the administrator afterwards obtains title to the note in her individual capacity does not entitle her to maintain the creditor's suit.

DITMAS *v.* MCKANE. 344
See EXECUTOR AND ADMINISTRATOR.

— Trust giving the beneficiary the right, on notice to the trustee that he desires to use the trust fund in his business, to have such principal—the title to the trust fund, whether real or personal, vests in the beneficiary—creditor's action to enforce a judgment against the fund.

ULLMAN *v.* CAMERON. 91
See WILL.

— Trustee in bankruptcy—his remedy to recover property, transferred by the bankrupt to a creditor in violation of the Bankruptcy Law, is in equity. HOUGHTON *v.* STINER. 171
See BANKRUPTCY.

— *For cases in which injunctions were sought.*
See INJUNCTION.

ESTOPPEL— When a decree on an accounting by a trustee does not, nor does the denial of a motion to open it, estop the *cestui que trust*.

MATTER OF L. I. T. & T. CO. (IN RE GARRETSON). 1
See TRUST.

— What precludes a principal contractor from objecting to a sub-contractor's work. GRAVES ELEVATOR CO. *v.* PARKER CO. 456
See PLEADING.

EVIDENCE—*Profits from the unlawful use of a printing press, the subject of a monopoly—burden of proof as to the profits—the damages being unliquidated interest is not allowable.*] 1. In an action brought to restrain the use by the defendant of two presses known as the Kidder perfecting presses, and for an accounting of the profits made by the defendant in printing strip tickets upon said presses, an interlocutory judgment was entered granting the injunction and appointing a referee to assess the plaintiff's damages. Such damages were adjudged to be the "profits made by the defendant the Hamilton Bank Note Engraving and Printing Company upon all strip tickets printed by it upon the two aforesaid presses purchased from the Kidder Press Manufacturing Company, known as the Kidder Perfecting Press, on proof before the referee that the Kidder Perfecting Press was the subject of a monopoly for strip ticket printing by virtue of outstanding patents, or was the only available machinery for printing strip tickets, or on proof that the Hamilton Bank Note Engraving and Printing Company could not have obtained the contracts to print said tickets except by means of the Kidder Perfecting Press, and in the absence of such proof that the damages shall be the saving in profit on said tickets by the use of the Kidder Perfecting Presses over the profits it would have made by printing the same on the presses in its possession, or known to and purchasable by it prior to December 29, 1892."

Held, that the provision of the judgment directing that, in certain contingencies, the plaintiff's damages should be ascertained on the basis of the difference in the profits realized from printing strip tickets on the Kidder perfecting presses and those realized from printing the strip tickets on other presses available to the defendant had been made for the defendant's benefit, and that the burden of showing the extent of the profits which would have been realized by printing the strip tickets upon other machines available to the defendant rested upon it;

That, as it appeared that the damages were unliquidated, and that there was no method by which the defendant could have computed the amount thereof, they being dependent on extrinsic facts, over the proof of which the defendant had no control, the plaintiff was not entitled to interest on such damages. *NEW YORK BANK NOTE CO. v. HAMILTON CO.*..... 427

2. — *Contract to furnish cuts representing a hardware and bicycle business—failure to furnish the cuts representing the bicycle business—testimony of the defendant that the bicycle business was important; that he paid for the cuts received by him; that he notified the plaintiffs of the alleged breach of the contract.*] In an action brought to recover under a contract, by which the plaintiffs agreed to advertise by cuts the hardware and bicycle business of the defendant, which were entirely distinct, the defendant alleged a breach of contract by the plaintiffs, in that the cuts furnished did not represent his bicycle business.

Held, that it was proper to permit the defendant to testify that the bicycle business constituted the largest share of his business;

That it was also proper to permit the defendant, over the plaintiffs' objection that it was incompetent, immaterial and irrelevant, to testify that he had paid the plaintiffs for the cuts which he had received;

That it was also proper to permit the defendant, over the plaintiffs' objection that it was incompetent, irrelevant and immaterial, to state whether he had notified the plaintiffs that they had broken their contract.

HELLINGER v. MARSHALL..... 607

3. — *Witness—his refusal to answer questions on cross-examination requires the rejection of his testimony in chief.*] A party has the right to cross-examine a witness produced against him by his adversary, and to have an answer to pertinent questions relating to testimony given on his direct examination. The penalty for a denial of this right is the rejection of the testimony given in chief. *GALLAGHER v. GALLAGHER*..... 138

4. — *The consent of the party calling him that he be compelled to answer does not alter the rule—effect of the presence of other testimony sufficient to sustain the judgment.*] In an action brought by a wife against her husband to obtain a separation, the latter interposed a counterclaim for an absolute divorce.

On the trial the defendant called as a witness the co-respondent, and proved by him facts from which the only legitimate inference was that the

EVIDENCE — *Continued.*

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plaintiff had committed adultery with him as alleged. On cross-examination the plaintiff asked of the witness the direct question whether he did have intercourse with the plaintiff at the time testified to by him. The witness declined to answer. The plaintiff pressed the question and requested the court to direct the witness to answer, which the court did, the witness still refusing. The request that the witness be compelled to answer was repeated, and an exception taken to the refusal of the court to do so, to which the court replied that he had not refused, and directed that the examination proceed. The witness still declining to answer, the plaintiff moved that his direct testimony upon the point involved be stricken from the record, which motion was denied and an exception taken.

Held, that the court should either have compelled the witness to answer or should have stricken from the record his evidence on the subject, and that his refusal to do so constituted an error requiring the reversal of a judgment awarding the defendant an absolute divorce;

That the judgment would not be permitted to stand, although it appeared that the defendant was willing that the witness should be compelled to answer;

That, as it did not appear that the court did not consider the testimony of the recalcitrant witness, the error could not be said to be harmless, even though there was sufficient other evidence of the plaintiff's adultery. *Id.*

— **Manslaughter** — unnecessary force used in self-protection — if that force did not cause the death a conviction is improper — proof that the deceased had one knife does not disprove his possession of another — a charge, in effect, that a preponderance of evidence establishes guilt beyond a reasonable doubt. **PEOPLE v. TAYLOR**..... 29

See CRIME.

— **Receiving stolen money** — delivery to an attorney by his client (the thief) of money which the attorney deposits to his credit in a bank — extent to which the evidence of the thief, if an accomplice, must be corroborated — declaration of the attorney as to the thief's methods. **PEOPLE v. AMMON**... 205

See CRIME.

— **Negligence** — a statement made by the husband of an injured party to an employee of a railroad corporation charged with the negligence causing the injury is inadmissible — a party is concluded by an answer made by a witness as to a collateral matter. **WIMMER v. METROPOLITAN STREET R. CO.** 258

See NEGLIGENCE.

— **Liability for damages to goods occurring after possession thereof has been demanded** — objection that evidence received generally is not admissible as to one of the defendants — it must be taken at the trial — failure to object to evidence not of the character required by law.

THYLL v. NEW YORK & LONG BRANCH R. R. CO...... 513

See RAILROAD.

— **Contract for the sale of old material** — a clause therein "I reserve the right, however, to keep whatever I want of the iron, safes and stone" — it may be explained by proof of the oral negotiations.

N. Y. HOUSE WRECKING CO. v. O'ROURKE..... 217

See SALE.

— **The delivery of savings bank books accompanied by the statement "If I die, bury me out of this and what is left is yours"** — proof that a particular bank book was among those delivered.

MAHON v. DIME SAVINGS BANK..... 506

See GIFT.

— **Trial of a police captain** — evidence insufficient to establish that he permitted disorderly houses to exist or that he failed to report suspicious places — what are "suspicious places."

PEOPLE EX REL. STEPHENSON v. GREENE..... 243

See MUNICIPAL CORPORATION.

— **An adjudication in a bankruptcy proceeding that the bankrupt was insolvent when the judgment was obtained against him, is conclusive against the judgment creditor.** **DEGRAFF v. LANG**..... 564

See BANKRUPTCY.

EVIDENCE — *Continued.*

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— Revocation of a guaranty — proof of the advice of an attorney and of a prior declaration of an intention to revoke it is incompetent.

LINCOLN NATIONAL BANK *v.* FISCHER-HANSEN..... 318
See CONTRACT.

— Electric plant — when it is a nuisance in a city — admissibility of a petition for an inspection by the board of health.

PRITCHARD *v.* EDISON EL. ILLUMINATING Co. 178
See NUISANCE.

— Proof, received without objection, of facts not alleged as a defense.

SCHIECK *v.* DONOHUE..... 303
See MORTGAGE.

— *Of negligence or contributory negligence.*

See NEGLIGENCE.

EXECUTION — Order to show cause shortening the time of notice of making an application to the court — it does not apply to the inauguration of a new action or proceeding, *e. g.*, the discharge of an imprisoned debtor.

MATTER OF QUICK..... 131
See IMPRISONMENT.

EXECUTOR AND ADMINISTRATOR — *Surcharging an executor's account — a claim due to the estate lost by accepting for it real property with a defective title — delay in enforcing a claim until the Statute of Limitations has run against it — a clause of a will bequeathing a law business, books "and all property pertaining to my business" does not include a debt due to the testator for legal services — costs, when imposed upon an executor individually.]*

1. On an accounting by the executors of Daniel W. Northup, a practicing lawyer, who died June 9, 1893, leaving a will by which he appointed the Long Island Loan and Trust Company his executor, it appeared that Northup and one Veeder had represented the Stewart estate in a litigation; that proceedings for the settlement of the litigation were in progress at the time Northup died; that, pending negotiations for the settlement of the litigation, Northup and Veeder had a conversation, in which they agreed to accept the sum of \$4,500 for their compensation, of which Northup was to receive \$3,000 and Veeder was to receive \$1,500; that Northup informed Veeder that the Stewart estate offered to convey, in part satisfaction of their claim, property known as the Clifton place, valued at \$3,500; that Veeder expressed his willingness, if paid \$1,000 in cash, to take a \$500 interest in the real estate; that four days after Northup's death the parties to the litigation entered into an agreement of settlement, providing, "that there shall be paid to D. W. Northup, attorney for the contestants of said will of 1887, and William D. Veeder of counsel for their services up to and including settlement, the sum of four thousand and five hundred dollars;" that thereafter the Stewart estate paid \$1,000 in cash, which was taken by Veeder, and conveyed the Clifton property to one Dooley, who executed a declaration that he held the same in trust for Veeder and the estate of Northup in the proportion of one seventh and six-sevenths respectively; that the conveyance to Dooley was made with the consent of Northup's executor; that the title to the property conveyed was unmarketable and that that fact could have been discovered by Northup's executor with the exercise of reasonable care, but that no examination of the title was made.

It did not appear that Northup knew the condition of the title at the time he consented to take it in part satisfaction of his claim.

Held, that no adequate excuse existed for the action of the executor in accepting the Clifton place, without any proper examination of the title thereto, in satisfaction of the debt, and that the executor's accounts should be surcharged with the \$3,000 which the estate had lost thereby.

It further appeared that at the time the testator died one Vosburgh was indebted to him in a considerable sum for legal services; that although this claim was mentioned in the inventory and was collectible the executor had made no effort to collect it and that the claim was at the time of the executor's accounting barred by the Statute of Limitations.

Held, that the executor's account was properly surcharged with the amount of this claim;

EXECUTOR AND ADMINISTRATOR — Continued.

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That Northup's claims against the Stewart estate and against Vosburgh for legal services did not pass under a clause of his will providing, "I give and bequeath to my son Dwight all my law business, law books, papers, safe, bookcases and office furniture, and all property pertaining to my business;"

That it was not improper for the surrogate, in the exercise of his discretion, to direct that the costs of the proceedings should be borne by the executor personally;

That, as a general rule, if an executor denies the existence of assets and such assets appear he will be personally charged with costs.

MATTER OF L. I. L. & T. CO. (IN RE NORTHUP)..... 5

2. — *An action is not maintainable by an administrator on a note deposited with a trust company pursuant to section 2595 of the Code of Civil Procedure — a creditor's action cannot be based on a judgment so obtained — the fact that the administrator afterwards obtains title to the note in her individual capacity does not entitle her to maintain the creditor's suit.*] Upon the death of Henry C. Ditmas, who held the promissory note of John Y. McKane for \$25,000, letters of administration on his estate were issued to Abigail V. Ditmas. She did not furnish a bond in an amount sufficient to entitle her to receive possession of the note, and the surrogate directed that the note should not pass to the administratrix but should be deposited with a trust company.

This action of the surrogate was taken pursuant to section 2595 of the Code of Civil Procedure, which provides that in a case where "the value of the estate or fund is so great that the surrogate deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of money belonging to the estate or fund be deposited with him, to be delivered to the county treasurer or be deposited subject to the order of the trustee, countersigned by the surrogate, with a trust company duly authorized by law to receive the same."

Thereafter the administratrix, without obtaining any further order or direction from the surrogate, brought an action against McKane on the note, recovered judgment against him for the amount thereof and issued an execution thereon, which was returned unsatisfied.

Subsequently, by a decree of the Surrogate's Court, the estate of the said Henry C. Ditmas was distributed and the note in question was delivered to his administratrix in her individual capacity. The administratrix then brought an action as administratrix and in her individual capacity to set aside alleged fraudulent conveyances executed by John Y. McKane.

Held, that the action could not be maintained, for the reason that the plaintiff had no authority to bring the action on the note without obtaining authority from the surrogate;

That a payment of the note to the plaintiff, while it was on deposit with the trust company, would not have discharged McKane's obligation thereon;

That the fact that the plaintiff, after obtaining judgment on the note, acquired title to the note in her individual capacity, did not entitle her to maintain the judgment creditor's action;

That, before such an action may be maintained, all the statutory requirements and conditions precedent must be complied with.

DITMAS v. MCKANE..... 344

3. — *Letters of administration — they will not be granted on the application of a non-resident alien to the public administrator — the public administrator or next of kin must petition therefor — a claim against an estate within the jurisdiction of a surrogate is property within his county — the public administrator is "contingently" entitled to letters.*] Rose Ferrigan, a resident of the city of New York, who had personal property therein, died, leaving as her sole next of kin a sister, Margaret Kehun, residing at Dundalk, Ireland. John Flynn of Providence, R. I., was appointed administrator of her estate and acted as sole administrator until his death, which occurred July 7, 1902.

The said Margaret Kehun died September 24, 1902. Prior to her death, she assigned all her interest in the Ferrigan estate to one Sheridan, a resident of Dundalk, Ireland.

EXECUTOR AND ADMINISTRATOR — Continued.

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At the time Flynn died, there was pending, undetermined, a proceeding by him for an accounting as administrator, in which proceeding he had interposed a claim of upwards of \$6,000 against the Ferrigan estate which consisted of upwards of \$9,000. After Flynn's death, Sheridan, through an attorney, filed a petition in the Surrogate's Court, in which he asked that letters of administration be issued upon Flynn's estate to the public administrator, which application was opposed by the next of kin of Flynn.

Held, that the Surrogate's Court had no jurisdiction, upon such application, to grant letters of administration upon the estate of Flynn to the public administrator unless some one or more of the next of kin of Flynn should apply for such letters within a specified time;

That Sheridan being a non-resident alien, the surrogate could not issue letters to him nor entertain a petition presented by him or another acting in his behalf for the issuance of letters;

That the existence of the claim made by Flynn against the estate was sufficient to give the Surrogate's Court jurisdiction, upon a proper application, to issue letters of administration upon his estate;

That the public administrator was absolutely or contingently entitled to letters and that, upon an application duly filed by him, letters could be issued to him unless the next of kin of Flynn should see fit to make the application.

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4. — *Letters of administration — they cannot be granted to a non-resident alien nor to a resident designated by him — he is not "contingently" entitled to letters — who is — the public administrator is entitled either absolutely or contingently.* Rose Ferrigan, a resident of the city of New York, who had personal property therein, died, leaving as her sole next of kin a sister, Margaret Kehun, residing at Dundalk, Ireland. John Flynn, of Providence, R. I., was appointed administrator of her estate, and acted as sole administrator until his death, which occurred July 7, 1902.

The said Margaret Kehun died September 24, 1902, leaving her surviving as her sole next of kin a son, William Henry Kehun, of Liverpool, England. Prior to her death, she assigned all her interest in the Ferrigan estate to one Sheridan, of Dundalk, Ireland. Subsequent to Flynn's death, Sheridan, through an attorney, filed a petition in the Surrogate's Court, for letters of administration *de bonis non* of the goods, chattels and credits of the said Rose Ferrigan.

Held, that the Surrogate's Court had no authority to appoint the attorney who filed the petition for Sheridan (the public administrator having refused to act) administrator *de bonis non* of the estate of the said Rose Ferrigan;

That there is no statutory provision by which a non-resident alien can obtain letters of administration for himself or another upon a petition filed by him for that purpose;

That Sheridan was not "contingently" entitled to the letters of administration, within the meaning of section 2662 of the Code of Civil Procedure:

That the word "contingently," as used in this section, means a person to whom, at the time the petition was filed, letters would issue, if persons having a prior right thereto under section 2660 of the Code of Civil Procedure did not take;

That the public administrator of the county of New York was entitled, either absolutely or contingently, to letters of administration on the estate, and that, if any reason existed why such letters should not issue to him, some other suitable person might be appointed.

MATTER OF FERRIGAN..... 376

— Action by an administrator — demurrer that he has not legal capacity to sue — right of a surviving partner in firm assets — his relation to the personal representative of his deceased partner — right of the latter — his remedy by action is for an accounting, not to enforce particular claims.

SECOR v. TRADESMEN'S NATIONAL BANK 294
See PARTNERSHIP.

— Power of an executor to compromise a claim against his testator's estate — the Surrogate's Court may authorize it — when a payment of \$60,000 to settle a claim for an entire estate of \$2,000,000 is proper.

MATTER OF GILMAN..... 463
See SURROGATE.

FAILURE TO PROSECUTE — *Dismissal of an action for a failure to prosecute it — when it is proper.*

See **McMANN v. BROWN**..... 249
See **FISHER MALTING CO. v. BROWN**..... 251

FALSE REPRESENTATION — Action against directors of a corporation to recover damages for alleged false representations — motion to make the complaint more definite and certain by alleging which of the defendants were directors at the respective times when the representations were made — bill of particulars. **VINER v. JAMES**..... 542

See **PLEADING**.

— False representations by one of three persons engaged in a joint adventure — when they relate to existing facts and not to expected events.

SPIER v. HYDE..... 467
See **CONTRACT**.

— False representations in the sale of merchandise deliverable in installments.
See **SALE**.

FIDUCIARY RELATION — *When the relations between the parties are of a fiduciary character.*

See **CONTRACT**.

— *What instrument does not create it.*
See **CORPORATION**.

FIRE — *Destruction by fire of freight in a railroad freight house — exemption from liability therefor in the bill of lading.*

See **NEGLIGENCE**.

FIRM :

See **PARTNERSHIP**.

FORECLOSURE — *Of a mortgage.*

See **MORTGAGE**.

FRANCHISE TAX :

See **TAX**.

FRATERNAL BENEFICIARY CORPORATION :

See **INSURANCE**.

FRAUD :

See **FALSE REPRESENTATION**.

FRAUDULENT CONVEYANCE — *Real property purchased with money advanced by a daughter of the grantee — oral understanding that the property should belong to the daughter — when conveyances of the property to a church corporation and by the church corporation to a third party will be set aside as fraudulent — mortgage executed by the third party.]* Patrick J. Corvin purchased certain real property with moneys, a portion of which had been contributed by his daughter, who was his only child. The title was taken in Corvin's name, and it was understood that he and his wife would use the premises as their home during their life, and that, upon their death, the property was to belong absolutely to the daughter whose contribution to the purchase price represented the full value of her estate in remainder.

Subsequently Corvin and his wife executed to a church corporation an absolute conveyance of the premises for a nominal consideration. The church corporation executed a deed conveying to the grantors a life interest in the premises, but the latter conveyance was not recorded. Subsequent to Mrs. Corvin's death, the church corporation conveyed the premises to Lizzie J. Hurley by a deed expressing a consideration of \$14,500, none of which was paid.

On the same day Corvin executed to her a release of his life estate in the premises. Hurley then executed a \$6,000 mortgage upon the property to secure a loan which she had procured and then reconveyed to Corvin a life interest in the premises. Five thousand dollars of the mortgage loan was paid to the church corporation and the remainder was used for the payment of expenses. Corvin married the said Lizzie J. Hurley three months later, and subsequently died.

FRAUDULENT CONVEYANCE — *Continued.*

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Held, that Corvin's daughter was entitled to a judgment declaring her to be the owner of the premises in fee simple subject to the \$6,000 mortgage, and to recover the \$5,000 received by the church corporation;

That Lizzie J. Hurley should be required to account for the rents of the premises, but that she should be protected, by bond or otherwise, against liability on the mortgage executed by her. *LEARY v. CORVIN* 544

— Trustee in bankruptcy — his remedy to recover property, transferred by the bankrupt to a creditor in violation of the Bankruptcy Law, is in equity. *HOUGHTON v. STINER*..... 171
See BANKRUPTCY.

FRIVOLOUS PLEADING:*See* PLEADING.**GENERAL RULE OF PRACTICE:***See* COURT.

GIFT — *Savings bank deposit — change of the account by the depositor so as to read "In account with Margaret Smith (the depositor), or son Frank J." — delivery of the bank book to a third person with instructions to deliver it to the son — the son takes the deposit if he survives his mother.*] 1. Evidence that one Margaret Smith who had opened a savings bank account in her own name subsequently procured the passbook to be changed so as to read, "In account with Margaret Smith or son Frank J.," and that a short time prior to her death she gave the passbook to her sister with directions to keep the same for her son, whose whereabouts were then unknown, and if he came back to give it to him, is sufficient to authorize a finding that it was the intent of the mother to make her son a joint owner with her in the fund, and that upon the death of the mother leaving the son surviving, the son took immediate title to the fund by right of survivorship, even though the passbook was not delivered to him during his mother's lifetime.

FARRELLY v. EMIGRANT INDUST. SAV. BANK..... 539

2. — *Quære whether the transaction constituted a gift inter vivos.*] *Quære*, whether the delivery of the passbook by the said Margaret Smith to her sister under the instructions set forth above, established a gift *inter vivos* of the bank account to her son. *Id.*

3. — *The delivery of savings bank books accompanied by the statement "If I die, bury me out of this and what is left is yours" — the transaction constitutes a gift causa mortis.*] Evidence that a woman, shortly before her death, while very sick, delivered a number of pass books representing deposits made by her in savings banks to a third person, at the same time saying to such person, "I think I am dying * * * I give you this. If I die, bury me out of this and what is left is yours," is sufficient to establish a valid gift *causa mortis* of the savings bank deposits to such third person.

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4. — *Proof that a particular bank book was among those delivered.*] Evidence sufficient to identify a particular pass book as being among those delivered, considered. *Id.*

GRANTOR AND GRANTEE — *Of real property.**See* VENDOR AND PURCHASER.**GUARANTY** — *Contract of.**See* CONTRACT.

HEALTH BOARD — *Allowance to a contractor for time spent in making alterations to comply with the rules of the board of health.*

See CONTRACT.

HIGHWAY — Telephone poles on a rural highway — they constitute an added burden on the fee thereof — Injunction.

GRAY v. YORK STATE TELEPHONE CO...... 89

See EMINENT DOMAIN.— *City streets.**See* MUNICIPAL CORPORATION.

HOMICIDE—*Manslaughter—unnecessary force used in self-protection—if that force did not cause the death a conviction is improper—proof that the deceased had one knife does not disprove his possession of another—a charge, in effect, that a preponderance of evidence establishes guilt beyond a reasonable doubt.*

See *PEOPLE v. TAYLOR* 29

HOSPITAL—*Conveyance of land to a hospital by a municipality—when the Constitution prohibits the Legislature from authorizing it.*

See *CONSTITUTIONAL LAW*.

HUSBAND AND WIFE—*Receiver in a matrimonial action—he must give a bond.*] 1. Section 715 of the Code of Civil Procedure, providing, "a receiver appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the People, with at least two sufficient sureties, in a penalty fixed by the court, judge or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver," applies to a receiver appointed in a matrimonial action.

MATTER OF SPIES..... 175

2. — *Effect of the order appointing him not requiring him to give a bond.*] An order appointing a receiver in a matrimonial action which does not require him to give a bond is not void, but merely voidable. *Id.*

3. — *It does not excuse the husband for refusing to deliver his property to the receiver.*] The husband cannot, because of the omission of this provision from the order appointing the receiver, legally refuse to deliver his property to the receiver upon demand; his remedy is by an appeal from the order. *Id.*

4. — *Action for divorce—when the court may refuse to confirm the referee's report.*] On the hearing of a motion to confirm the report of a referee authorizing the entry of a judgment of absolute divorce, it is the duty of the court to examine the testimony, and, although the reference was to hear, try and determine, it may refuse to confirm the report unless it is satisfied upon the whole case that the divorce should be granted. *GALLOWAY v. GALLOWAY*... 300

5. — *What circumstances tend to show collusion justifying the court in refusing to confirm a report in plaintiff's favor—opportunity to the plaintiff to disprove collusion.*] On such a motion it appeared that the evidence satisfactorily established the commission of the offense by the defendant and that the plaintiff, when sworn as a witness, denied that the action was brought through connivance, privity or procurement. It further appeared, however, that the defendant had interposed an unverified answer denying the commission of adultery and that he offered no testimony in his defense and did not cross-examine the plaintiff's witnesses except in some slight particulars which rather tended to strengthen the plaintiff's case than to show a defense; that at the close of the hearing, the attorneys for the respective parties entered into a stipulation providing for the amount of the temporary alimony, the time at which it should be payable and that the amount thereof should be made permanent.

Held, that the circumstances tending to show collusion were sufficiently strong to justify the court in refusing to confirm the report; that the court should either itself take testimony or send the case back to the referee, in order to afford the plaintiff an opportunity to show that there was, in fact, no collusion. *Id.*

6. — *Charging a wife with unfaithfulness—it may constitute cruel treatment.*] *Semble*, that the action of a husband in charging his wife, in the hearing of their infant child and various other persons, with being unfaithful to him may constitute cruel and inhuman treatment entitling the wife to maintain an action for a separation. *SMITH v. SMITH*..... 443

7. — *Alimony not allowed to a wife living at her husband's home—a counsel fee is proper.*] Where, in an action brought by the wife for a separation on this ground it appears that the wife is living at the husband's home and is being adequately supported there by him, the court should not award the wife alimony *pendente lite* conditional upon her electing to quit her husband's residence. The court may, however, award the wife counsel fees *pendente lite*. *Id.*

IMPRISONMENT — *Order to show cause shortening the time of notice of making an application to the court — it does not apply to the inauguration of a new action or proceeding, e. g., the discharge of an imprisoned debtor.*] Section 780 of the Code of Civil Procedure, authorizing the court, upon the presentation of an affidavit showing grounds therefor, to permit a motion to be made, through the medium of an order to show cause, on less than the eight days' notice ordinarily required, only applies to matters already pending and over which the court has acquired jurisdiction. The section does not apply to any of those steps which are required by statute to be taken in order to inaugurate a new action or proceeding.

Consequently where a person imprisoned under a body execution makes application to be discharged from imprisonment, pursuant to section 2205 of the Code of Civil Procedure, which requires that at least fourteen days before the petition is presented to the court the petitioner must serve upon the judgment creditor a copy of such petition and schedules "together with a written notice of the time when and place where they will be presented," the court has no power to dispense with the full fourteen days' notice, as the proceedings for the discharge of an imprisoned debtor are not commenced until the petition, schedules and affidavit, with due proof of service, as prescribed in section 2205 of the Code of Civil Procedure, are presented to the court. **MATTER OF QUICK.** 131

INJUNCTION — *Sought by a majority stockholder, restraining the directors of a corporation, minority stockholders, from holding a special meeting or disposing of its assets — the complaint and moving affidavits verified on information and belief, not stating the sources thereof, are insufficient.*

See **GILLETTE v. NOYES.** 313

— *Trade mark — use of the words "Conserva Di Tomato" not enjoined — the use of a label calculated to deceive will be enjoined.*

See **RONCORONI v. GROSS.** 221

— *Stay of proceedings in one action not proper in another — an injunction may in a proper case be granted.*

See **PURDY v. BAKER.** 242

— *Telephone poles on a rural highway — they constitute an added burden on the fee thereof — injunction.*

See **GRAY v. YORK STATE TELEPHONE CO.** 89

— *An unlawful combination enjoined from spying upon another person's business.*

See **STRAUS v. AMERICAN PUBLISHERS' ASSN.** 350

INJURY:

See **NEGLIGENCE.**

INSOLVENCY:

See **BANKRUPTCY.**

INSTALLMENT — *Of merchandise deliverable under a contract.*

See **SALE.**

INSURANCE — *Oral agreement by a director of a co-operative fire insurance company that a new policy would be issued on the expiration of an existing one — destruction of the property after the expiration of the existing policy and pending action on the application for the new policy — provision that the policy might be made payable to the mortgagee — the name of the mortgagee need not be stated.*] 1. A co-operative fire insurance company issued a policy of insurance upon farm buildings expiring November 24, 1900. The directors of the association were its soliciting agents, and in January, 1900, one of such directors named Babcock informed the insured that the policy had expired. The insured made an application for a new policy and paid a portion of the premium. A new policy was issued, but was canceled, Babcock having learned that the existing policy had not expired.

The insured had, in the meantime, paid the balance of the premium and it was orally agreed between him and Babcock that, upon the expiration of the existing policy, a new policy would be issued; that Babcock would

INSURANCE— *Continued.*

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attend to the execution of the new policy and that the premium paid by the insured should be retained by Babcock and applied on the new policy. Both the application and the premium were retained by the insurance company.

November 24, 1900, when the existing policy expired, the insured went to Babcock's home and applied for a renewal of the policy. There was some dispute as to whether the insured signed the application, but it was taken by Babcock and mailed to the office of the insurance company, which received it on the morning of November twenty-seventh. On the same day a portion of the insured property was destroyed by fire. Thereafter the insurance company, without knowledge of the fire, returned the policy to Babcock for the purpose of having it signed by the applicant and of having a mortgagee clause inserted therein.

Babcock was absent from home when the policy arrived, but returned a few days later, when he took the application to the insured and procured his signature thereto and the insertion therein of the name of the mortgagee. The application was then sent to the insurance company and was rejected by it.

In an action brought on the oral agreement, made by Babcock at the time the new policy issued in January, 1900, was canceled, to the effect that a new policy would be issued on the expiration of the existing policy, it appeared that Babcock, as a director, had in his custody blank applications to be signed by applicants for insurance and that his approval of the application was required before the policy was issued; that the by-laws of the insurance company provided: "The president and secretary shall have power to issue policies at any time on property insured by any directors, providing such application meets the requirements of said Acts and these By-laws."

There was nothing in the by-laws of the association prohibiting a director from making an oral agreement for temporary insurance which should be valid until the home officers acted.

Held, that while Babcock did not possess authority to issue, in form, a written policy binding upon the defendant, he did have authority to make a valid agreement on behalf of the defendant to insure the property which was effective until the defendant took definite action on the application;

That, assuming that the home officers might eventually reject the application, Babcock's oral agreement was valid until such rejection;

That the insurance company could not reject the application simply because a loss had occurred;

That a provision in the by-laws that the "policies may at the request of the insured be endorsed * * * payable to mortgagee, as h. . interest may appear," did not make it obligatory upon the insured, who stated in the application that the premises were incumbered, to give the name of the mortgagee. *LOOMIS v. JEFFERSON CO. PATRONS' ASSN.*... 601

2. — *Accident insurance policy excluding injuries "of which there is no visible mark on the body" — pallor, emaciation and decline constitute "visible" marks — incorrect statement of full particulars of the accident — refusal to permit the insurer to hold an autopsy — laches in the demand therefor.* In an action upon a policy of insurance, "against bodily injuries sustained wholly and exclusively through external violence occasioned accidentally by visible means," it appeared that the policy provided "That this insurance does not cover injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark)."

The insured, an athletic man, in vigorous health, fell from a bicycle and broke his right femur. Immediately after the accident he complained of intense pain in his back between the shoulder blades and in his chest. There were no visible marks upon the insured's back or chest. The fractured femur reunited, but the pains continued with increased intensity until the insured finally died. The physician attributed his death to angina pectoris caused by the fall from the bicycle. Immediately after the accident the insured's face became pallid and he began to decline, which condition continued progressively until his death.

Held, that the insurance company was not relieved from liability under the provision of the policy, "That this insurance does not cover injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark);"

INSURANCE — Continued.

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That the insured's pallor, emaciation and decline furnished visible signs of his injury;

That where it is plain that an accident has occurred and severe injuries have resulted and it is a fair deduction from the circumstances that death ensued as the direct consequence of such accident the policy should be construed to hold the defendant liable, even though no contusions or marks appear upon the body;

That a notice, sent by the insured to the defendant the day after the accident, describing in detail the manner and time of the accident and that the injury sustained was a broken hip bone, this being the best information then possessed by the insured and his physician, constituted a sufficient compliance with the provision of the policy requiring the written notice to contain "full particulars of the accident;"

That a breach of a provision in the policy, that "any medical adviser of the company shall be allowed to examine the * * * body of the assured," could not be predicated upon the refusal of the defendant's demand for an autopsy, made the day after the insured had been buried, it appearing that the defendant knew of the insured's death two days before his burial and that the demand for the autopsy was not made upon any of the insured's relatives, but upon a person who was subsequently appointed administrator of the insured's estate;

That the delay of the defendant in making the demand for the autopsy was unreasonable. *ROOT v. LONDON GUARANTEE & ACCIDENT CO.* 578

3. — *Fraternal beneficiary corporation of the State of Indiana — attachment by a beneficiary of a "relief fund" deposited in bank in the State of New York — right thereto of the attaching beneficiary as against receivers of the corporation appointed in Indiana and in New York — such fund is not impressed with a trust.* The Supreme Council of the Order of Chosen Friends was a fraternal beneficiary corporation organized under the laws of the State of Indiana and was operated upon the assessment plan. The assessments were not levied to pay particular claims, but to pay claims generally. Ten per cent of the proceeds of the assessments were devoted to the general expenses of the corporation and the remaining ninety per cent was deposited in a fund known as the "Relief Fund" and used for the payment of claims. The "Relief Fund" was deposited in various banks throughout the country and checks drawn by the corporation in payment of approved claims were paid by the banks in which the relief fund was deposited without regard to the order in which such checks were issued.

July 16, 1900, the association paid one Brown, who held as beneficiary under a certificate issued by the association an approved claim for \$2,000, \$200 on account thereof. December 14, 1900, a temporary receiver of the corporation was appointed by the Supreme Court of Indiana on the ground that the corporation was, and had long been, insolvent. December 16, Brown, who was a resident of the State of New York, began an action at law in the Supreme Court against the corporation to recover the balance of her claim. She obtained a warrant of attachment on the ground that the defendant was a foreign corporation and served such warrant upon a New York bank in which \$7,067.62 of the relief fund had been deposited to the credit of the "Supreme Council of the Order of Chosen Friends Relief Fund." December 22, 1900, a temporary receiver of the assets of the corporation within the State of New York was appointed. December 27, 1900, the bank instituted an action to determine the rights of the various parties in the fund.

Held, that Brown's right to the fund by virtue of her attachment lien was superior to that of the receivers of the corporation;

That the funds deposited with the banks were subject to the claims of the corporation's creditors, and were not impressed with a trust in favor of those entitled to share in the relief fund. *NATIONAL PARK BANK v. CLARK* 263

4. — *Life insurance — meaning of words "to excess" in the question "Have you ever used liquor to excess?"* The phrase "to excess," used in the following question contained in an application for a life insurance policy: "Have you ever used liquor to excess?" is equivalent to "excessively" or "intemperately."

INSURANCE — *Continued.*

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The fact that the insured, who answered the question in the negative, had been intoxicated at various times preceding the making of the application, does not establish, as matter of law, that the insured used liquor "to excess," but that question is one of fact for the determination of the jury.

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5. — *Verdict that the insured had not used liquor "to excess" set aside as contrary to the evidence.*] A verdict that the insured had not used liquor "to excess" should, however, be set aside as against the weight of evidence, where it appears that all of the witnesses sworn on both sides, except the defendant's solicitors, had seen the insured intoxicated on one or more occasions; that on four occasions prior to making the application he had been arrested for public intoxication, and three times, at least, had pleaded guilty to the charge, and that at another time he was unable to complete work which he had solicited, because of his intoxicated condition. *Id.*

6. — *Marine insurance—restriction to "New Haven harbor and adjacent inland waters," construed— it does not authorize the use of the vessel in Bridgeport harbor.*] A policy of marine insurance upon a steam dredge containing the following provision, "Warranted confined to the use and navigation of the waters of New Haven Harbor and adjacent inland waters," does not cover the sinking of the dredge in Cedar creek, an inland water, which is a part of or an adjunct to Bridgeport harbor, where it appears that Bridgeport harbor is some seventeen miles and Cedar creek some eighteen miles west of New Haven harbor.

In such a case it is as probable that the phrase "adjacent inland waters," was the language of the insured as that it was the language of the insurer, and under such circumstances the rule that the policy must be construed strictly against the insurer does not apply. KIRK v. HOME INSURANCE CO. . 26

INTEREST — *When considered in determining whether a recovery in a Justice's Court is more or less than an offer made.*

See COSTS.

— *As damages.*

See DAMAGES.

— *When allowable on an award.*

See EMINENT DOMAIN.

INTERVENTION — *Right of a party to intervene in an action.*

See PARTY.

ISSUE — *Trial of.*

See TRIAL.

JEW'S HOSPITAL IN NEW YORK — *Conveyance of land to a hospital by a municipality— when the Constitution prohibits the Legislature from authorizing it.*

See CONSTITUTIONAL LAW.

JUDGMENT — Counterclaim authorized by subdivision 2 of section 502 of the Code of Civil Procedure—if not replied to, the defendant may take judgment—form of such judgment.

HUNTER v. FISS. 164

See PLEADING.

— Judgment of mortgage foreclosure, entered after an answer was overruled as frivolous—where the order overruling the answer is reversed on appeal the Special Term must vacate the judgment.

HIDDEN v. GODFREY. 373

See MORTGAGE.

— When a decree on an accounting by a trustee does not, nor does the denial of a motion to open it, estop the *cestui que* trust.

MATTER OF L. I. L. & T. CO. (IN RE GARRETSON). 1

See TRUST.

JUSTICE OF THE PEACE — Costs on appeal from a judgment of a justice of the peace — when interest is considered in determining whether a recovery is more or less than an offer. *ROSE v. WELLS*..... 75
See COSTS.

JUSTICE OF THE SUPREME COURT — *At an election held on November third a vacancy in the office of justice of the Supreme Court occurring on the previous August third may be filled.*
See PEOPLE EX REL. HART v. GOODRICH..... 445

LABEL — *Use of, when enjoined.*
See TRADE MARK.

LABOR LAW — *Liability of the master for the fall of a scaffold.*
See NEGLIGENCE.

LACHES — *On the part of an accident insurance company in making a demand for an autopsy.*
See ROOT v. LONDON GUARANTEE & ACCIDENT CO...... 578

LANDLORD AND TENANT — A tenant falling in a dark hall in a tenement house from catching her foot in the oilcloth — contributory negligence, not inferred as matter of law because of her knowledge of the conditions — duty imposed thereby — admission of present ownership of the demised premises and denial of all the other allegations of the complaint — it is not a denial of ownership at the time mentioned in the complaint.

KEATING v. MOTT..... 156
See NEGLIGENCE.

LIBEL — *Venus — action for libel in which a plea in mitigation of damages is interposed — the county in which the publication was made held to be the proper place of trial.*

See WOOLWORTH v. KLOCK..... 142

LIEN — *Mechanic's lien — it attaches, where the contractor fails, and the owner completes the building, to the amount remaining due after deducting the cost of completing the building.] A building contract provided that the contractor should be paid the actual cost of the labor and materials, together with five per cent on such cost, but that the entire sum paid to him should not exceed \$317,810; that he should be paid, from time to time during the progress of the work, ninety per cent of the value of the labor and materials, together with two and a half per cent of the cost of such labor and materials, and should be paid the balance of the contract price upon the completion of the work.*

The contractor made a general assignment for the benefit of creditors at a time when he had earned, over and above the payments received by him, \$70,761.90. Under the provisions of the contract providing for the retention of ten per cent of the cost of the labor and materials and of two and a half per cent of such cost until the completion of the work, only \$53,967.85 was then due and payable to him. Subsequent to the making of the general assignment, the owner, pursuant to a provision of the contract, completed the work at such a cost that only \$58,898.76 remained due to the contractor.

Held, that liens filed by sub-contractors and by materialmen did not attach to the \$70,761.90 which the contractor had earned at the time he made the general assignment, but only to the \$58,898.70 remaining due after the completion of the work. *NEW JERSEY STEEL & IRON CO. v. ROBINSON*..... 496

LIFE INSURANCE:
See INSURANCE.

LIMITATION OF ACTION — Surcharging an executor's account — delay in enforcing a claim until the Statute of Limitations has run against it.
MATTER OF L. I. L. & T. CO. (IN RE NORTHRUP)..... 5
See EXECUTOR AND ADMINISTRATOR.

LIQUIDATED DAMAGES:
See DAMAGES.

MANDAMUS — Election — when the inspectors and poll clerks have not performed their duty a peremptory writ of mandamus directing a recount and canvass of the votes is proper — the existence of a remedy by action does not prevent its issue — mere irregularities not affecting the result do not call for it — the common-law powers of the court are not taken away by the statutory authority as to mandamus — what statements are insufficient as denials. *PEOPLE EX REL. BRINK v. WAY*..... 82
See ELECTION.

— Receiver — approval by the Attorney-General of a contract for the employment and compensation of attorneys and counsel by receivers — not compelled by mandamus — purpose of section 4 of chapter 60 of the Laws of 1902. *MATTER OF CANDEE v. CUNNEEN*..... 71
See RECEIVER.

— The remedy where there is an error in an audit by a town board is by certiorari — a mandamus is improper.
PEOPLE EX REL. MCCABE v. MATTHIES..... 16
See TOWN.

MANSLAUGHTER — *Unnecessary force used in self-protection — if that force did not cause the death a conviction is improper — proof that the deceased had one knife does not disprove his possession of another — a charge, in effect, that a preponderance of evidence establishes guilt beyond a reasonable doubt.*
See PEOPLE v. TAYLOR..... 29

MANUFACTURE — *Of goods under contract.*
See SALE.

MARINE INSURANCE:
See INSURANCE.

MASTER AND SERVANT — Negligence — section 18 of the Labor Law applies to a scaffold used for erecting machinery in a factory — injury to a servant from the falling of a scaffold which an independent contractor, employed by the injured servant's master, was obliged to build, but which was built by the injured servant pursuant to directions from his foreman — the master is not liable. *WINGERT v. KRAKAUER*..... 228
See NEGLIGENCE.

— Scaffold constructed by the employee falling therefrom — the master is not liable, although the scaffold does not comply with section 18 of chapter 415 of the Laws of 1897. *ROTONDO v. SMYTH*..... 153
See NEGLIGENCE.

— When an employee is not engaged in his master's business.
WIMMER v. METROPOLITAN STREET R. CO...... 258
See NEGLIGENCE.

— *Injury of a servant through negligence.*
See NEGLIGENCE.

MEASURE — *Of damages.*
See DAMAGES.

MECHANIC'S LIEN:
See LIEN.

MISREPRESENTATION:
See FALSE REPRESENTATION.

MITIGATION — *Pleadings in, of libel.*
See LIBEL.

MONOPOLY — *Profits from the unlawful use of a printing press, the subject of a monopoly.*
See EVIDENCE.

MORTGAGE—*Foreclosure—election because of non-payment of interest that the principal sum be due—when, notwithstanding default in payment of interest, the mortgagee may not elect that the principal be adjudged to be due—proof, received without objection, of facts not alleged as a defense—appeal determined on the theory on which the case was tried.*] 1. The complaint in an action brought to foreclose a mortgage on real property alleged that the semi-annual interest due on April 6 and October 6, 1901, was not paid, and that after the lapse of thirty days the mortgagee, pursuant to the terms of the mortgage, elected that the entire principal should become due and payable.

Upon the trial it appeared that the defendant duly tendered the interest due October 6, 1900, but that the mortgagee refused to receive it, claiming that the mortgage was fraudulent and void. Shortly thereafter the mortgagee brought an action to have the mortgage in suit declared null and void on the ground of fraud, and to have a previous mortgage given to secure the same indebtedness reinstated and foreclosed.

This action was discontinued, without costs to either party, by stipulation on October 15, 1901. The present action was begun November 18, 1901. Prior to the commencement of the present action the mortgagee made no demand for the payment of any of the installments of interest, and never gave the mortgagor notice of the withdrawal of his claim that the mortgage in suit was void or that he would accept the interest which had been previously tendered, or the subsequent installments of interest. Before the second installment of interest became due the mortgagee changed his residence and gave the mortgagor no notice thereof, and the latter was unable to ascertain it, although she made diligent inquiry.

During the pendency of the former action the mortgagor expressed to the mortgagee's attorney her willingness to pay the installments of interest due, but the attorney refused to accept the same unless the mortgagor would pay him a further sum of \$150 costs.

Held, that, under the circumstances, the mortgagee was not at liberty to elect that the entire principal should become due because of the mortgagor's default in the payment of the two installments of interest, until he had notified the mortgagor of his determination to treat the mortgage as valid or of his readiness to accept the interest at a designated place;

That the action, therefore, could not be maintained as one to foreclose the mortgage to secure payment of the principal, but that, as the installments of interest were due and unpaid, the action could be maintained to secure payment of such interest;

The mortgagor, in her answer, alleged that prior to the commencement of the action, she had tendered to the mortgagee the installments of interest which were alleged to be unpaid and that the mortgagee had declined to accept them. Upon the trial no objection was taken to the evidence introduced by the mortgagor for the purpose of excusing her failure to make the tender of the interest.

Held, that as the mortgagor might have been permitted to amend her answer, if objection had been taken to the admission of the evidence in question, she was entitled, upon an appeal taken by her from the judgment, to have the appeal determined upon the theory on which the action was tried.

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2. — *Removal of steel beams from a building existing on real property at the time of the execution of a mortgage thereon—right of the mortgagee to sue therefor without alleging insolvency on the part of the mortgagor—measure of damages—when it is the cost of restoration and when the diminution in market value.*]

In an action brought by the holder of a bond and mortgage to recover damages for injuries done to the mortgaged premises, it appeared that the defendant, after having been served with the summons and complaint in an action to foreclose the mortgage, removed from the mortgaged premises a number of steel beams and lintels which had theretofore, before the execution of the mortgage, been incorporated into the building. The complaint in the action did not allege the insolvency of the mortgagor, but did allege that the value of the plaintiff's security was impaired by the defendant's acts.

Held, that the foundation of the action was the impairment of the security of the mortgage with knowledge of the lien, and that it was not incumbent upon the plaintiff to allege the insolvency of the mortgagor;

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That the admission over the defendant's objection of proof of the mortgagor's insolvency did not require the reversal of a judgment in favor of the plaintiff;

That evidence of the cost of restoring the mortgaged premises to their former condition and of the diminution in the market value thereof was admissible;

That if the cost of repairing the injury was less than the diminution in the market value, the cost of repair, with an allowance for the loss of the use of the property in consequence of the injury, was the proper measure of damages, but that if the cost of repair was more than the diminution in the market value, the latter was the true measure of damages;

That if the plaintiff's proof was confined to one of these two methods of ascertaining the damages, and the defendant failed to offer any proof as to the other method or to raise any question on the trial as to the failure of the plaintiff to supply it, the defendant could not avail himself of such omission on appeal. *OGDEN LUMBER Co. v. BUSSE*..... 143

3. — *Judgment of mortgage foreclosure, entered after an answer was overruled as frivolous—where the order overruling the answer is reversed on appeal the Special Term must vacate the judgment.*] One of the defendants in an action to foreclose a mortgage on real property interposed an answer which was overruled as frivolous. A judgment of foreclosure was entered September 17, 1903, pursuant to which the premises were sold on October 14, 1903. The purchaser at the sale refused to take title on the ground that the judgment was illegal and that an appeal had been taken from the order overruling the answer. An order was subsequently entered directing that the premises be resold unless the purchaser, on or before October 14, 1903, completed the purchase. Prior to October 14, 1903, the order overruling the answer as frivolous and directing judgment for the plaintiff was reversed by the Appellate Division. Thereupon the answering defendant moved for an order vacating the judgment and setting aside the sale. The court denied the motion, but stayed the plaintiff from readvertising the sale until after the determination of the issues raised by the defendant's answer.

Held, that the answering defendant was entitled to have the judgment vacated, as the judgment of foreclosure necessarily fell with the reversal of the order overruling the answer as frivolous and directing the entry of judgment;

That the Special Term had no discretion, but was required to vacate the judgment of foreclosure upon the application of the answering defendant;

That the question as to what effect should be given to the sale should be determined after the trial of the issues raised by the answer and in a proceeding to which the purchaser was a party. *HIDDEN v. GODFREY*..... 378

4. — *Provision that a fire insurance policy might be made payable to the mortgagee—the name of the mortgagee need not be stated.*] A provision in the by-laws of a cooperative fire insurance company that the "policies may at the request of the insured be endorsed * * * payable to mortgagee, as h.. interest may appear," does not make it obligatory upon the insured, who stated in the application that the premises were incumbered, to give the name of the mortgagee

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— Right of a creditor of a defendant in a mortgage foreclosure action to intervene—what must be shown where the application rests on an oral agreement inconsistent with written documents.

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— Trust—transfer by a trustee of a mortgage owned by him, to the trust fund—it is against public policy.

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MOTION AND ORDER — <i>Injunction sought by a majority stockholder, restraining the directors of a corporation, minority stockholders, from holding a special meeting or disposing of its assets—the complaint and moving affidavits verified on information and belief, not stating the sources thereof, are insufficient.</i> See GILLETTE v. NOYES	813
— Order to show cause shortening the time of notice of making an application to the court—it does not apply to the inauguration of a new action or proceeding, e. g., the discharge of an imprisoned debtor. See MATTER OF QUICK.....	131
— Failure of the Comptroller to appear on the motion for a writ of certiorari to review his refusal to revise a franchise tax—it does not prevent him from moving to amend the writ. See PEOPLE EX REL. N. Y. REALTY CO. v. MILLER.....	116
— Venue—a defendant who notices the case for trial, and obtains a postponement of the trial until the next term of court, thereby waives his right to move for a change of venue. See COLEMAN v. HAYES.....	575
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MT. SINAI HOSPITAL—*Conveyance of land to a hospital by a municipality—when the Constitution prohibits the Legislature from authorizing it.*
See CONSTITUTIONAL LAW.

MUNICIPAL CORPORATION—*The employment of an architect by the commissioner of correction in the city of New York is authorized by chapter 626 of the Laws of 1896—term of such employment—a premature employment made effective by ratification.* [1. Chapter 626 of the Laws of 1896 authorized the commissioner of correction of the city of New York, with the approval of the board of estimate and apportionment, to construct additions to the city prison.

Section 2 of the statute provided: "The said commissioner of correction and the said board of estimate and apportionment are each hereby authorized to employ a competent architect to prepare or examine any plans for any work proposed to be done under the provisions of this act. * * *

Section 3 provided: "When any work provided for by this act shall have been authorized, and the plans and specifications therefor approved by the board of estimate and apportionment, the said commissioner of correction shall proceed to execute and carry out said work, which shall be done by contract. * * *

Section 4 directed the comptroller to issue consolidated stock "For the purpose of carrying out the work authorized by this act, including the compensation of the architects employed by said commissioner of correction to prepare plans and specifications and to supervise the work done thereunder and of the architect employed by the board of estimate and apportionment to examine any plans and specifications."

Held, that the statute contemplated that the commissioner of correction and the board of estimate and apportionment should each employ a competent architect to prepare or examine any plans for any work proposed to be done under the act;

That the commissioner of correction also had power to employ an architect to supervise the work done thereunder, but that this additional power could not be exercised by the commissioner of correction until the board of estimate and apportionment had approved the plans;

That the employment by the commissioner of correction of an architect for the purpose of preparing plans and specifications and of supervising the

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work would terminate upon the completion of the work, and not upon the expiration of the term of office of the commissioner of correction;

That the employment of an architect by the commissioner of correction prior to the time when the act went into effect, was rendered effective by ratification after the act took effect. *WITHERS v. CITY OF NEW YORK.* ... 147

2. — *Reveio by certiorari of the trial of a police captain — duty of the Appellate Division thereon.*] In reviewing, pursuant to a writ of certiorari, the action of the police commissioner of the city of New York in dismissing a police captain after a trial on charges, it is the duty of the Appellate Division to determine in the first instance whether there was any competent proof of all the facts necessary to be proved to justify the conviction, and if so, then to determine whether there was such a preponderance of evidence against the determination of the commissioner as would necessitate setting aside the verdict of a jury as against the weight of evidence, had a jury found the existence of such facts in an action in the Supreme Court.

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3. — *Evidence insufficient to establish that a house was disorderly.*] Evidence that on a single occasion strangers were able to obtain admission to a hotel without difficulty, and found therein women ready to participate in immoral acts, is not sufficient to establish that the house was a disorderly one where common prostitutes resorted and resided. *Id.*

4. — *What are "suspicious places."*] The rule of the New York police department requiring police captains to report the "location of all suspicious places and places where it is suspected that violations of the law are planned or occur," and which is silent as to what constitutes a "suspicious place," contemplates that the determination of that matter shall be left to the judgment and discretion of the police captain; such judgment and discretion must be founded upon evidence and not upon a mere whim or caprice on the part of the police captain. *Id.*

— Railroad — right to occupy a city street acquired under a resolution of the common council — a failure to occupy the whole length of the street is an abandonment — passage of a subsequent resolution authorizing the use of the portion not occupied — a provision in the subsequent resolution authorizing the common council to revoke it at its pleasure is reasonable — the ownership of the fee of the street is immaterial.

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See RAILROAD.

— Land taken to extend Riverside drive in New York city — award embracing the value of the land and interest thereon to the date of the report — the landowner is entitled to interest on the entire award — when the rule that an excessive demand is ineffectual to set interest running does not apply. *MATTER OF CITY OF N. Y. (IN RE DORSETT).*..... 523

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— Conveyance of land to a hospital by a municipality — when the Constitution prohibits the Legislature from authorizing it — the fact that the land was thereby made subject to tax does not afford a consideration.

MOUNT SINAI HOSPITAL v. HYMAN...... 270
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— Negligence — collision between a cab and a street car at a street intersection — ordinance giving the car the right of way over the cab — the rights of the parties are governed thereby.

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— Payment for a permit to repair an areaway, in existence for fifty years, in a street in New York city — when it is voluntary and cannot be recovered. *WOLFF v. CITY OF NEW YORK.*..... 449

See PAYMENT.

— *Injury to one using a public street.*

See NEGLIGENCE.

NEGLIGENCE—*A passenger on a street car injured by a collision between such car and a car attempting to pass by a crossover switch, due to its rear truck following the switch track instead of the main track — liability of the one company owning the railroad and of the other using it under a traffic agreement — respective obligation, to the person injured, of the two companies — res ipsa loquitur — excessive speed.*] 1. In an action brought against the United Traction Company and the Schenectady Railway Company, to recover damages for personal injuries sustained by the plaintiff, it appeared that the United Traction Company operated a double-track street railway in the city of Albany, and that the Schenectady Railway Company operated its cars over the traction company's tracks under a traffic agreement which devolved upon the traction company the duty of keeping in repair the tracks and switches; that at the time in question the traction company was engaged in repairing a portion of its west-bound track, and that both east and west-bound cars were obliged to use the east-bound track; that one of the traction company's west-bound cars, upon which the plaintiff was a passenger, had crossed over to the east-bound track and proceeded to the east end of a permanent crossover leading from the east-bound to the west-bound track; that an east-bound car of the Schenectady Railway Company had just been transferred over the permanent crossover to the west-bound track and had stopped with its east end about ten feet west of the west end of the crossover; that some person, apparently acting on behalf of the traction company, threw the point of the tongue of the switch in the crossover, so that the Schenectady company's car could be run easterly on the west-bound track past the permanent switch, for a distance sufficient to permit the traction company's car to cross over to that track and proceed westerly thereon; that there being a steep grade descending toward the east, the motorman of the Schenectady car started it by releasing the brake without applying any power; that the front trucks of the car passed over the tongue of the switch properly, but that when the rear trucks reached the tongue it had evidently moved out of position, so that the rear truck took the crossover instead of the west-bound track, throwing the rear end of the car against the traction company's car and causing the plaintiff to receive injuries.

Held, that a judgment against both defendants should be affirmed;

That the plaintiff, being a passenger on one of the traction company's cars, that company was bound to use the utmost human skill and foresight with reference to maintaining, operating and keeping in repair its tracks and switches, in order to save him from harm;

That the tongue of the switch having failed to remain in position, or having been misplaced because of some unexplained or unascertained cause, it was not incumbent upon the plaintiff, as against the traction company, to show the cause of the displacement;

That, under the doctrine of *res ipsa loquitur*, the traction company was required to explain the cause of the displacement, in order to relieve itself from the presumption that its negligence caused the accident;

That, with respect to the plaintiff, the Schenectady Railway Company was only bound to use reasonable and ordinary care with respect to the circumstances confronting it at the time;

That it bore the same relation to the plaintiff as if he had been driving his own horse and wagon upon the street instead of being a passenger upon one of the traction company's cars;

That, in view of the heavy down grade, the weight of the Schenectady car, and the knowledge of the motorman that the switch was not fitted with appliances to hold the tongue in place, and that, when running against the point of the tongue instead of against the heel thereof, he was using the switch in a manner in which it was not intended to be used, reasonable and ordinary care required the motorman to proceed very slowly and to keep his car under control;

That, under the circumstances, negligence on the part of the motorman might be based upon the fact that he testified that his car was moving about three or four miles an hour when he discovered that the rear truck had taken the crossover. *KLINGER v. UNITED TRACTION CO.* 100

2. — *A statement made by the husband of an injured party to an employee of a railroad corporation charged with the negligence causing the injury is inadmissible — a party is concluded by an answer made by a witness as to a*

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collateral matter — when an employee is not engaged in his master's business.] In an action brought to recover damages for personal injuries sustained by the plaintiff, the plaintiff contended that she received her injuries in consequence of being thrown from one of the defendant's street cars while she was attempting to board it, because of the car starting with a violent jerk before she had time to get on the car.

The defendant contended that, after the plaintiff had boarded the car and the car had started, she discovered that her husband and daughter had not succeeded in boarding it and thereupon deliberately stepped off the car.

Upon the trial the defendant called one Worden, a car starter in its employ, as a witness, and he testified in support of the defendant's version of the transaction. It appeared that after the accident Worden assisted the plaintiff's husband in removing the plaintiff to a waiting room. After the defendant had closed its case, the plaintiff recalled Worden to the stand and interrogated him respecting a conversation with the plaintiff's husband in the waiting room. Worden denied having had the conversation, and, among other things, testified that the plaintiff's husband did not tell him in the waiting room that his wife was thrown from the car. Subsequently the plaintiff's husband was called as a witness and, over the defendant's objection, was allowed to testify that he had a conversation with Worden in the waiting room and that in the course thereof he told Worden that his wife had been thrown from the car.

Held, that the admission of the husband's evidence was improper;

That when the plaintiff called Worden and interrogated him in respect to the alleged conversation, a matter collateral to the issue, she became bound by his answers and could not, therefore, call witnesses to contradict him;

That the evidence was prejudicial to the defendant, as it allowed the jury to consider the husband's declaration that his wife had been thrown from the car;

That the declarations made by Worden in the waiting room after the accident were not binding upon the defendant as he was not then engaged in the defendant's business. *WIMMER v. METROPOLITAN STREET R. Co.*... 258

3. — *Injury to an employee while in a pot-hole between the rails of a street railway — the company is not liable for the failure of a competent foreman to warn the employee of the approach of a car — assumption of risk.]* In an action brought to recover damages for personal injuries it appeared that the defendant owned a street railroad operated by a cable; that it was necessary from time to time to oil and replace the wheels upon which the cable ran; that in order to do this work it was necessary for the oilers to go into openings, called pot-holes, located between the rails under the surface of the street; that a foreman of the defendant was employed as an oiler, and that the plaintiff was employed as the foreman's helper, and in the performance of his duties was subject to the foreman's directions; that when a workman was in a pot-hole it was necessary that some person should stand guard near the hole, to prevent trucks from driving into it and to warn the workman in the hole of the approach of cars in time for him to get out of the hole and enable them to pass; that the foreman and the plaintiff alternated in going into the pot-hole and in standing guard; that on the occasion of the accident the plaintiff was working in a pot-hole which, as claimed by him, was too small to permit him to remain therein while a car was passing over it, and that in consequence of the failure of the foreman, who was standing guard, to warn the plaintiff of the approach of a car, the latter was struck by the car while attempting to come out of the hole. The foreman was a competent person to guard the hole.

Held, that when the defendant had stationed a competent person to guard the hole while the plaintiff was working therein, it had discharged its entire duty with respect to the plaintiff, and that it was not liable for the failure of the foreman to warn the plaintiff of the approach of the car;

That the plaintiff assumed, among the other risks of the employment, the risk that the foreman might become inattentive, careless and neglectful of his duties and omit to give the warning when required.

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4. — *Scaffold constructed by the employee falling therefrom — the master is not liable although the scaffold does not comply with section 18 of chapter 415 of the Laws of 1897.*] In an action brought to recover damages resulting from the death of the plaintiff's intestate while in the employ of the defendant, a boss painter, it appeared that the intestate and one Nelson were directed to paint the shutters on a factory building: that, the space being so restricted that the ordinary scaffolds could not be used, the defendant instructed Nelson and the intestate to construct one; that Nelson and the intestate constructed, out of material procured by them from the defendant's shop, a scaffold which did not comply with section 18 of chapter 415 of the Laws of 1897, which provides: "Scaffolding or staging swung or suspended from an overhead support, more than twenty feet from the ground or floor, shall have a safety rail of wood, properly bolted, secured and braced, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, and properly attached thereto, and such scaffolding or staging shall be so fastened as to prevent the same from swaying from the building or structure."

The evidence tended to show that while the intestate was standing upon, or stepping from the sill of a window to the scaffold, he lost his balance and fell in consequence of the swaying of the scaffold.

Held, that the scaffold having been constructed by the intestate and his companion, and not by the defendant, the latter was not liable because the scaffold did not comply with the law nor because it was not so fastened as to prevent it from swaying. *ROTONDO v. SMYTH*..... 153

5. — *Collision between a cab and a street car at a street intersection — charge that if, when the cab drove upon the track, the motorman could not avoid the collision by the exercise of ordinary care, the plaintiff could not recover — ordinance giving the car the right of way.*] In an action brought to recover damages for personal injuries sustained by the plaintiff in consequence of a collision at a street intersection between a cab which he was driving easterly and one of the defendant's north-bound street cars, a sharp conflict arose upon the trial as to the relative positions of the cab and the car when the plaintiff attempted to cross the track.

Held, that it was improper for the court to refuse to charge that "If the jury in this case find from the evidence that while the defendant's north-bound car was proceeding in the ordinary and lawful course of defendant's business, the plaintiff, while such car was in full sight, drove in front of it at a time when the car was so near that it could not be stopped by the motorman by the exercise of ordinary care, then the plaintiff cannot recover and the defendant is entitled to a verdict;"

That the court having received in evidence without objection a city ordinance providing, "On all the public streets or highways of this city, all vehicles going in a northerly or southerly direction, shall have the right of way over any vehicle going in an easterly or westerly direction," it was improper for the court to charge that at the place where the collision occurred the rights of the parties were equal, and to refuse to charge that under the ordinance the car had the right of way over the cab.

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6. — *Care required of a motorman on an electric car to prevent a collision with a truck — it is that which a person of reasonable prudence exercising reasonable care would use under similar circumstances.*] In an action brought to recover damages for personal injuries sustained by the plaintiff in consequence of a collision at a street intersection between one of the defendant's street cars and a truck which the plaintiff was driving, the court charged, with respect to the duty of the defendant's motorman, "and if you find that he did use all the care that was required of him and all the care that he could use at the time, then your verdict will be for the defendant."

Held, that the charge was erroneous, as its effect was to instruct the jury that the defendant was obliged to use an extraordinary degree of care, whereas it was obliged to exercise only that degree of care which a person of reasonable prudence exercising reasonable care would use under similar circumstances;

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That the following proposition, "if the motorman of the defendant's car, while operating his car with ordinary care, stopped his car as soon as he discovered that the plaintiff was about to drive in front of his car, defendant is entitled to a verdict," if charged without qualification, would have cured the error, but that as the trial judge in response to the request to charge this proposition said, "I charge that in connection with the charge already made," thus in effect leaving the obnoxious instruction in the case, it did not operate to cure the error. *KLIMPL v. METROPOLITAN STREET R. Co.*.... 291

7. — *Injury from a collision between an open street car and a truck by reason of which a passenger is struck by the shaft of the truck—a verdict of \$25,000 where there is neither the loss of a limb nor total disability, reduced.*] In an action brought to recover damages for personal injuries, it appeared that the plaintiff was a passenger upon one of the defendant's open street cars; that the motorman of the car, without stopping it, attempted to pass a truck traveling in the opposite direction; that a collision resulted in consequence of which the shaft of the truck was thrown over upon the car and the plaintiff was injured thereby.

Held, that a judgment entered upon a verdict in favor of the plaintiff should be affirmed;

That whether the collision was the result of the negligence of the motorman in attempting to pass the truck without stopping was a question for the jury;

That although the plaintiff's injuries were very severe and he would never fully recover therefrom, yet, as he was not totally disabled and was, at the time of the trial, able to attend to his business, a verdict of \$25,000 was excessive and should be reduced to \$20,000;

That such a sum as \$25,000 may properly be awarded only where, by the loss of a limb or other total disability, the plaintiff is permanently disabled.

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8. — *Footpath across the tracks of a railroad—when it is not of such a kind as to require active vigilance to protect one using it.*] In an action brought to recover damages resulting from the death of the plaintiff's intestate, a boy ten years of age and *sui juris*, who, while crossing the defendant's railroad track, which was constructed upon its right of way, was struck and killed by a locomotive, the plaintiff contended that the intestate was killed while crossing upon a path or traveled way across the railroad tracks which the defendant had permitted the employees of a neighboring soap factory and others to use for many years. The alleged path led from an open field on the west side of the right of way to the yard of the soap factory on the east side of the right of way. At the western end of the alleged path an opening two feet wide had been left in the railroad fence. At the eastern end of the alleged path the railroad fence was down. All persons attempting to use the alleged path from either direction were obliged to trespass on private property in order to get to it.

Held, that the pathway was not such a one as imposed upon the defendant the duty of exercising active vigilance to protect persons using the same from injury. *LE DUC v. N. Y. CENTRAL & H. R. R. Co.*..... 107

9. — *Personal injury—a disease must necessarily and directly be caused by such injury.*] A complaint in an action to recover damages for personal injuries alleged: "Said plaintiff was knocked and thrown from his wagon to the ground and floor of said bridge, and thereby severely injuring the said plaintiff, breaking his ribs, spraining his ankle and injuring his back and right hip, and thereby made him sick, sore, lame and disabled for a long time, and prevented him from attending to his business, causing him to suffer great pain of body and mind, and caused him permanent injury and disability and exposed him to still greater and further injury, and he has been and will be put to great trouble and expense in doctoring and trying to be cured of his said injuries."

Held, that proof that the plaintiff was suffering from kidney disease as a result of the accident was not admissible under the pleadings, it not appearing that such disease was necessarily and directly caused by the injuries to the plaintiff's back. *LOCKWOOD v. TROY CITY RAILWAY Co.*..... 118

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10. — *Injury to a driver thrown out of a wagon which collided with a street car on a narrow bridge — charge as to the care required of the railroad company.*] In an action brought to recover damages for personal injuries, sustained by the plaintiff in consequence of a collision between the plaintiff's wagon and one of the defendant's street cars, it appeared that the collision occurred upon a bridge which was so narrow that there was only a small margin of space outside the defendant's tracks in which the plaintiff's wagon could pass the defendant's car.

At the conclusion of the principal charge the following colloquy took place between the defendant's counsel and the court: "In view of the statement of the plaintiff's counsel to the jury in the summing up, that the defendant was bound to exercise an extraordinary degree of care in operating this car upon the bridge, I ask you to charge the jury that when the defendant's motorman was on the bridge in the operation of the car, the only duty and obligation resting upon him to avoid injury to the plaintiff was the exercise of the reasonable care which a reasonably prudent man would exercise under the circumstances. The Court: Well, yes, but it should be greater than it would be in a safer place. The narrowness of the passage placed a duty upon the motorman to exercise greater care and caution than he would if the passageway had been wider. Mr. Roche: I except to the charge and to the modification. I ask you, however, to say that while the duty and obligation must be proportioned to the surrounding circumstances, the defendant's motorman was not bound to exercise an extraordinary degree of care in the operation of the car. The Court: I decline so to charge." Defendant excepted.

Held, that the denial of the request to charge that the defendant's motorman was not bound to use an extraordinary degree of care was erroneous;

That notwithstanding the court said, "Well, yes," to the request as first made, the modification of the request was followed so closely by the denial of the request to charge that the motorman was not bound to exercise an extraordinary degree of care that the jury might have believed that it was the duty of the motorman to exercise extraordinary care;

That the defendant was entitled to a charge that the motorman was not bound to exercise an extraordinary degree of care, but ordinary care only, under the circumstances which confronted him. *Id.*

11. — *Section 18 of the Labor Law applies to a scaffold used for erecting machinery in a factory.*] Section 18 of the Labor Law (Laws of 1897, chap. 415), providing that "a person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged," applies to a scaffold erected for the purpose of installing machinery in a room in a factory building which previously contained no machinery.

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12. — *Injury to a servant from the falling of a scaffold which an independent contractor, employed by the injured servant's master, was obliged to build, but which was built by the injured servant pursuant to directions from his foreman — the master is not liable.*] In an action brought to recover damages for personal injuries sustained by the plaintiff in consequence of the collapse of such a scaffold, it appeared that the defendants, who were engaged in moving their factory, entered into a contract with a machinist by which the latter agreed to move the machinery from the old factory and install it in the new one in accordance with the directions of the defendants' foreman; that he also agreed to furnish two men and all the material necessary. The machinist testified that nothing was said about the building of scaffolds for use in installing the machinery, but that it was necessary to erect scaffolds for this purpose, and that when that was the case, it was the work of the machinist to build them.

It further appeared that the plaintiff and a fellow-workman, who were in the employ of the defendants, were detailed to assist the machinists

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when necessary; that the foreman directed the plaintiff and his fellow-workman to build a scaffold for use in installing the machinery, and instructed them to use for the purpose timber which was then upon the premises; that there was plenty of material with which to construct the scaffold properly and safely. The plaintiff and his companion selected the timber to be used, determined the character of the scaffold and the method of constructing it and completed the same without any interference on the part of the defendants or the foreman. Subsequently, while the plaintiff, the machinists and others were upon the scaffold assisting in placing certain machinery in position the scaffold broke and the plaintiff was injured.

The accident was caused either by the improper construction of the scaffold or the use of defective material therein or by the manner in which it was used.

Held, that when the defendants' foreman directed the plaintiff and his fellow-workman to build the scaffold he was simply directing them to assist the independent contractor, and not directing how the independent contractor should do his work or furnishing either the plaintiff or the independent contractor with a scaffold;

That as the defendants were under no obligation to provide a scaffold for use in installing the machinery and did not assume such an obligation, it could not be said that the defendants built the scaffold or furnished it for the plaintiff's use;

That the accident was due to the negligence of the plaintiff and his fellow-workman and not to that of the defendants. *Id.*

13. — *A tenant falling in a dark hall in a tenement house from catching her foot in the oilcloth — contributory negligence, not inferred as matter of law because of her knowledge of the conditions.*] A tenant who, while walking through a dark hallway in a tenement house, sustains injuries in consequence of catching her foot in some holes in the oilcloth covering the floor of the hallway, cannot be said, as a matter of law, to have been guilty of contributory negligence because she knew of the torn condition of the oilcloth, but that question is one of fact for the consideration of the jury.

Her knowledge of the condition of the hallway imposed upon her the duty of using due care to avoid the danger, but it cannot be said that she failed in this duty by neglecting to keep constantly in mind the exact location of the holes in the oilcloth. *KEATING v. MOTT* 156

14. — *Admission of present ownership of the demised premises and denial of all the other allegations of the complaint — it is not a denial of ownership at the time mentioned in the complaint.*] The complaint in the action brought by the tenant to recover damages for the injuries sustained by her alleged that at all times therein mentioned the defendant was the owner of the premises. The answer alleged: "First. This defendant admits that he is the owner of the fee of certain premises in the city of New York, commonly known as No. 445 West Thirty-ninth street, and this defendant, upon information and belief, denies each, all and every the other allegations in said complaint contained."

Held, that the provision of the answer was not a denial of the defendant's ownership of the premises at the time mentioned in the complaint, but would be regarded rather as an admission of that fact. *Id.*

15. — *Destruction of freight in a railroad freight house by fire — it does not establish negligence on the part of the railroad company — exemption in a bill of lading from liability for loss by fire.*] Where freight, destroyed by fire while in the freight house of a railroad company, was shipped under a bill of lading exempting the railroad company from liability for the loss of the freight by fire, the owner of the freight cannot recover its value from the railroad company without showing that the fire was the result of the negligence of the railroad company or of some breach of its duty. The occurrence of the fire does not, of itself, justify an inference of negligence on the part of the railroad company. *VAN AKIN v. ERIE R. R. Co.* 23

16. — *Contractors who break a water main and thereby flood adjacent premises are liable in trespass.*] Sub-contractors engaged in excavating the rapid transit subway in the city of New York, who, in the process of blast-

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ing rock, break a water main, the water from which flows upon and injures adjoining property, are liable in trespass to the owner of such property.

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17. — *When they are also liable for negligence.*] Where it appears that the sub-contractors placed the dynamite with which the blasting was done within a foot of the water pipe, which was nearer than the rules of the department of water supply permitted, and that they neglected to turn off the water or to protect the pipe in any way, although they had been previously warned of the danger of breaking the pipe, and that the rock could have been removed by other methods, which, if employed, would not have injured the pipe, liability on the part of the sub-contractors may be predicated on the ground of negligence. *Id.*

18. — *Proximate cause.*] The fact that the water pipe was laid, in violation of the rules of the water department, upon rock, and not upon soft material, does not excuse the sub-contractors from liability, as the proximate cause of the breaking of the pipe was the blast and not the manner in which the pipe was laid.

The proximate cause is the efficient cause, the one which necessarily sets the other cause in operation. *Id.*

19. — *Complaint alleging both negligence and trespass.*] Where the complaint in an action is so framed as to permit a recovery either upon the ground of trespass or negligence, and the trial is conducted on the theory that a recovery can be had on either ground, and judgment is rendered against the defendants without specifying the ground of liability, the fact that the trial justice, as indicated in a memorandum made by him, held that the defendants were liable in trespass, does not prevent the Appellate Division from affirming the judgment on the ground that the defendants were guilty of negligence if the evidence is sufficient to sustain a finding to that effect. *Id.*

— Carrier — when exemption from liability does not apply — the burden of showing negligence is on the shipper — evidence establishing negligence.

THYLL v. NEW YORK & LONG BRANCH R. R. Co. 513
See RAILROAD.

— Railroad company — it must use reasonable diligence to furnish an adequate number of freight cars.

STROUGH v. N. Y. CENTRAL & H. R. R. R. Co. 584
See RAILROAD.

NEGOTIABLE PAPER — *Law relating to.*

See BILLS AND NOTES.

NEW YORK CITY — *The employment of an architect by the commissioner of correction in the city of New York is authorized by chapter 628 of the Laws of 1896 — term of such employment — a premature employment made effective by ratification.*

See WITHERS v. CITY OF NEW YORK. 147

— *Trial of a police captain — evidence insufficient to establish that he permitted disorderly houses to exist or that he failed to report suspicious places — what are "suspicious places."*

See PEOPLE EX REL. STEPHENSON v. GREENE. 243

— *Payment for a permit to repair an areaway, in existence for fifty years, in a street in New York city — when it is voluntary and cannot be recovered.*

See WOLFF v. CITY OF NEW YORK. 449

NEWSPAPER — *Publication of election notices in.*

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NOTICE — *Crediting by a bank to a customer's account the proceeds of a note discounted — effect of notice to the bank that there was an entire failure of consideration for the note before it pays over the money — how far notice of dishonor is notice of such infirmity in the paper.*

See ALBANY COUNTY BANK v. PEOPLE'S ICE CO. (No. 1). 47

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— *Order to show cause shortening the time of notice of making an application to the court — it does not apply to the inauguration of a new action or proceeding, e. g., the discharge of an imprisoned debtor.*

See MATTER OF QUICK..... 181

NUISANCE — Electric plant — when it is a nuisance in a city.] 1. Evidence that the operation of a plant for the generation of electricity, constructed by a private corporation in a residential district of the city of New York, is attended by vibrations, noise, smoke, dirt and bad odors, which invade and injuriously affect the use and enjoyment of a hotel adjoining said plant, will sustain a finding that the plant constitutes a nuisance.

PRITCHARD v. EDISON EL. ILLUMINATING CO..... 178

2. — *Obstruction of the street by ashes.]* Any obstruction of the street in front of the hotel by ashes or dirt from the plant may be properly considered by the jury. *Id.*

3. — *That it could not be otherwise operated is no defense.]* The fact that the plant could not be operated in the locality without creating a nuisance constitutes no defense to the corporation. *Id.*

4. — *Measure of damages of the lessee of an adjoining hotel.]* A lessee of he hotel is entitled to recover from the corporation the damages sustained by him during the period that he is in possession.

The measure of the lessee's damages is the injury to the usable value of the hotel, which consists of the diminution in the room rent of the hotel and the loss in consequence of the inability of the lessee to supply refreshments to those whose presence was prevented by the nuisance.

It is not improper for the court to charge that the damages which the lessee could recover "are to be limited to the actual loss of profits, such as you find from the evidence were caused to be lost through the defendant's acts in the use and operation of its power station," where it appears that no profits were alleged or proved, except such as were directly connected with the room rent and the restaurant.

The court may properly refuse to charge that "the measure of damages applicable to a case of this kind is the actual diminution in rental value by reason of the defendant's acts," as such request limited the lessee to a recovery of the actual diminution of rental value instead of the diminution in the usable value.

The court may properly refuse to charge that "loss of income from business is not provable as an element of damage." *Id.*

5. — *Admissibility of a petition for an inspection by the board of health.]* Where an inspector of the board of health, who examined the electric plant and the hotel, is called as a witness by the lessee and details the result of his examination, and the defendant brings out upon his cross-examination that the inspection was based upon a petition or complaint to the health department, the admission of the petition in evidence on the request of the plaintiff's counsel does not constitute reversible error, where, as stated by the court, the petition was admitted, simply for the purpose of showing what it was, and not as proof of any of the facts contained therein. *Id.*

6. — *Character of the neighborhood considered.]* In determining whether the use of real property is so unwarrantable and unreasonable with respect to adjacent property as to constitute a nuisance, the character of the neighborhood should be taken into consideration. *Id.*

OFFICIAL BOND:

See BOND.

OPTION — Agreement by a vendor of lands to repurchase the premises "at the end of three (3) years" — the vendee has a reasonable time thereafter in which to elect to reconvey — what is a reasonable time — a delay of five years — effect of a sale of part of the premises by the vendee.

See MAIER v. REBSTOCK..... 587

— *Election by a mortgagee to have the whole principal sum become due because of a default in the payment of interest.*

See MORTGAGE.

ORAL AGREEMENT:*See* CONTRACT.**ORAL EVIDENCE:***See* EVIDENCE.**ORDER:***See* MOTION AND ORDER.**ORDINANCE** — *Of a municipality, construction, etc., of.**See* MUNICIPAL CORPORATION.**PAROL EVIDENCE:***See* EVIDENCE.

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PARTNERSHIP — *Right of a surviving partner in firm assets.*] 1. Upon the death of one of the two members of a firm, the legal title to all the personal property of the firm vests in the surviving partner, and the latter has the sole and exclusive right to enforce the collection of the choses in action belonging to the firm, to pay the firm debts and to liquidate the firm affairs.

SECOR v. TRADESMEN'S NATIONAL BANK. 294

2. — *His relation to the personal representative of his deceased partner.*] The relation existing between the surviving partner and the personal representative of the deceased partner is not that of trustee and *cestui que trust*, although it partakes somewhat of that nature. *Id.*

3. — *Right of the latter.*] The personal representative of the deceased partner is entitled to have the assets of the partnership applied to the payment of the firm debts and to the distribution of any surplus that may remain. *Id.*

4. — *His remedy by action is for an accounting, not to enforce particular claims.*] For the purpose of enforcing this right, the personal representative is entitled to maintain an action against the surviving partner for an accounting as to all his transactions, but he cannot maintain actions to enforce partnership claims or to reduce the partnership assets to possession.

Semble, that in case of fraud, wasteful mismanagement and disregard of the rights of deceased partners, the personal representative may maintain an action for an accounting and the appointment of a receiver by whom the partnership claims may be enforced.

Where, therefore, the personal representative of the deceased partner alleges that the surviving partner has refused to bring an action to recover a fund belonging to the partnership, and has attempted, without consideration, to release his claim thereto, but does not allege that the assets of the copartnership are sufficient to pay the firm debts, he cannot maintain an action against the surviving partner and persons who have received portions of the fund in question to compel an accounting with respect to such fund and the payment of the same to him for the following reasons, viz., that the right to maintain such an action is vested solely in the surviving partner, and that, in the absence of proof that the firm assets exceed the firm liabilities, the personal representative of a deceased partner has no beneficial interest in the fund. *Id.*

— False representations by one of three persons engaged in a joint adventure — when they relate to existing facts and not to expected events — when the relations between the parties are of a fiduciary character — what constitutes a breach of such fiduciary obligation — effect of an agreement by which two of the associates were authorized to make changes and modifications in the contract. SPIER v. HYDE 467

See CONTRACT.

— Contract to share in the profits of a purchase of real property — oral agreement by one party to give his interest therein to the other, who assumed the incumbrances on the property — enforced against the party transferring his interest and against his undisclosed assignee. SMITH v. KISSEL. 335

See CONTRACT.

PARTY — *Right of a creditor of a defendant in a mortgage foreclosure action to intervene.*] 1. A creditor of a defendant in an action to foreclose a mortgage on real property is not, by virtue of such relation, entitled to intervene in the action. BOUDEN v. LONG ACRE SQUARE BUILDING CO. 325

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2. — *What must be shown where the application rests on an oral agreement inconsistent with written documents.*] A person seeking to intervene in an action, and to interpose a defense based upon an alleged oral agreement, absolutely inconsistent with the written documents relating to the matter, should present a strong case to remove the suspicion of bad faith and give reasonable grounds for believing that he has a meritorious defense. *Id.*

— Action by stockholders in behalf of the corporation to recover stock alleged to have been improperly issued to parties engaged in its organization — what instrument of subscription for stock of the corporation constitutes a contract with the parties to whom the stock was issued, and not with the corporation — what does not create fiduciary relations between such parties and the corporation — any wrong done must be remedied in an action by the subscribers. *HUTCHINSON v. SIMPSON*..... 382
See CORPORATION.

— Trust giving the beneficiary the right, on notice to the trustee that he desires to use the trust fund in his business, to have such principal — creditor's action to enforce a judgment against the fund — when the fact that residuary legatees are not made parties is not a ground of objection. *ULLMAN v. CAMERON*..... 91
See WILL.

— Amendment, by bringing in an additional defendant — costs, where the case has gone to the Court of Appeals on the question as to the necessity of so doing. *STEINBACH v. PRUDENTIAL INSURANCE Co.*..... 440
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PATHWAY — Obligation to protect one using it.
See NEGLIGENCE.

PAYMENT — For a permit to repair an areaway, in existence for fifty years, in a street in New York city — when it is voluntary and cannot be recovered.] 1. An owner of a building in the city of New York, in front of which there had existed continuously since 1854, apparently without any permit from the city authorities, an areaway under the sidewalk, attempted, in 1897, to replace the wooden cover of said areaway with an iron one. The commissioner of public works had requested the police commissioner to prevent work from being done, without a permit, on vaults in the public streets. While the work of replacing the cover was being performed by a contractor employed by the owner, a policeman appeared and demanded the production of a permit from the department of public works. The permit not being produced, he threatened to arrest the workmen. The owner, being informed of these facts, applied for and obtained from the department of public works a permit for the construction of a vault under the sidewalk, paying therefor the sum of \$229.50. He made no claim to any city authority that he had any existing right to construct the areaway. It did not appear that the vault privileges conferred by the permit were not in excess of those previously exercised by the owner.

Held, that the payment for the permit was voluntary and that the owner was not entitled to recover from the city the amount which he paid therefor. *WOLFF v. CITY OF NEW YORK*..... 449

2. — *Payment of an increased freight rate with knowledge that ten days' notice of the increase had not been given as required by the Interstate Commerce Law.*] A shipper who voluntarily and without objection pays an increased freight rate upon the goods shipped by him, with knowledge that the railroad company had not given the ten days' notice of the change in the freight rates as required by the Interstate Commerce Act, is not entitled to recover from the railroad company the excess freight charge.

STROUGH v. N. Y. CENTRAL & H. R. R. Co 584

— An adjudication in bankruptcy proceeding that the bankrupt was insolvent when the judgment was obtained against him, is conclusive against the judgment creditor. *DE GRAFF v. LANG*..... 564
See BANKRUPTCY.

PAYMENT — Continued.

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— Crediting by a bank to a customer's account the proceeds of a note discounted — it is not a payment for the note — the bank does not become a holder for value. *ALBANY COUNTY BANK v. PEOPLE'S ICE CO. (No. 1)....* 47
See **BILLS AND NOTES.**

PENALTY:*See* **DAMAGES.****PERSONAL PROPERTY — Sale of.***See* **SALE.****PLACE OF TRIAL:***See* **VENUE.**

PLEADING — Amendment of a complaint for damage from the overflow of water from an adjoining lot — terms imposed on the amendment of a complaint where a juror has been withdrawn on a trial — when the proposed amended complaint does not state a new cause of action.] 1. The original complaint in an action to recover for injury done to the plaintiff's premises, caused by water flowing from defendant's premises, alleged that the injuries were caused by the "carelessness and negligence of the defendant," and demanded \$1,500 damages. Upon the trial, the court being of the opinion that the complaint did not state a cause of action, because it was to be inferred therefrom that the damage was caused by surface water, permitted the plaintiff, upon payment of the trial fee, to withdraw a juror and move at the Special Term for leave to amend the complaint. The proposed amended complaint alleged that the injury was caused by water percolating through the soil from defendant's premises, caused by the negligence of the defendant in failing to keep a waste pipe attached to the water closet in the rear of his adjacent premises in proper repair and to repair a break therein, and by failing to keep a wash basin in the rear of his premises in proper repair, and in negligently allowing a water pipe on his premises to freeze and burst. The proposed amended complaint further alleged that the defendant during a period of four months failed and neglected to repair these defects "and abate the nuisance maintained upon his said premises, although repeatedly requested so to do by plaintiff," and that during this period water kept constantly flowing into plaintiff's cellar, weakening, decaying and rotting the foundation walls of plaintiff's cellar and depriving plaintiff's tenants of the use of the cellar, in consequence of which her tenants left and plaintiff "suffered great loss of rents," and that plaintiff's damages altogether amount to \$5,000.

The damages which the plaintiff sought to recover under the proposed amended complaint were, except as to the amount, the same as those which she sought to recover under the original complaint.

Held, that the motion to serve the proposed amended complaint should be granted upon payment of ten dollars costs of the motion and all the taxable costs of the action except the trial fee;

That the proposed amended complaint did not state an entirely new cause of action, as it was apparent that a recovery under the original complaint would bar a recovery under the proposed amended complaint;

That the proposed amended complaint merely amplified the original complaint by setting forth more fully the grounds on which the defendant was liable and by demanding increased damages. *COYLE v. DAVIDSON.....* 323

2. — *Action against directors of a corporation to recover damages for alleged false representations — motion to make the complaint more definite and certain by alleging which of the defendants were directors at the respective times when the representations were made — bill of particulars.]* The complaint in an action brought against the directors of a corporation alleged that by reason of certain statements contained in an address of the defendant James, one of the directors, and by reason of statements made in addresses of other of the directors at various times and in annual reports of the corporation, certain representations were made which were false, and that the plaintiff acting upon them bought shares of stock in the corporation; and after having bought those shares, refrained from selling them in consequence of false, fraudulent and untrue statements, upon which she relied. Relief was asked against all of the defendants.

PLEADING—Continued.

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It was not alleged that at all the times therein mentioned all the defendants were directors or were connected with or could be made responsible for false representations, if such representations were made.

Held, that the plaintiff should be required to make her complaint more definite and certain by specifically alleging which of the defendants were directors at the respective times the alleged false reports or statements upon which the plaintiff relied were put forth and the times at which the plaintiff purchased her stock;

That the defendants were not limited to a demand for a bill of particulars. *VINER v. JAMES*..... 542

3. — *Counterclaim authorized by subdivision 2 of section 502 of the Code of Civil Procedure — if not replied to, the defendant may take judgment.*] Where the defendant in an action upon a promissory note sets up several counterclaims pursuant to subdivision 2 of section 502 of the Code of Civil Procedure, which provides, "if the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand existing against a person who assigned or transferred it after it became due, *must be allowed as a counterclaim* to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him," and the plaintiff does not reply to such counterclaims, the defendant may, under section 515 of the Code of Civil Procedure, take such proper judgment as he may be entitled to by reason of a failure to reply.

There is no distinction, regarding the necessity of a reply, between a counterclaim under section 502 of the Code of Civil Procedure and any other counterclaim. *HUNTER v. FISS*..... 164

4. — *Form of such judgment.*] In such a case, if the plaintiff neglects to reply, the defendant is entitled to a judgment establishing the rights of the parties under the pleadings, but not to an absolute dismissal of the complaint, as that would result in a judgment on the merits destroying the defendant's liability on the promissory note and yet leaving all the counterclaims open to enforcement against the plaintiff's assignor. *Id.*

5. — *Amendment, by bringing in an additional defendant — costs, where the case has gone to the Court of Appeals on the question as to the necessity of so doing.*] Upon the trial of an action the defendant made a motion to dismiss the complaint because of the failure of the plaintiff to join a party whose presence was alleged to be necessary. The motion was denied by the trial court and judgment was rendered in favor of the plaintiff. The ruling was sustained by the Appellate Division, but was reversed by the Court of Appeals, which granted a new trial, with costs to abide the event. The plaintiff thereupon made a motion to bring in the party in question and the motion was granted on payment of ten dollars costs.

Held, that the court should, as a condition of granting the motion, have required the plaintiff to pay fifty dollars costs.

STEINBACH v. PRUDENTIAL INSURANCE CO...... 440

6. — *Admission of present ownership of the demised premises and denial of all the other allegations of the complaint — it is not a denial of ownership at the time mentioned in the complaint.*] The complaint in the action brought by a tenant to recover damages for injuries sustained by her alleged that at all times therein mentioned the defendant was the owner of the premises. The answer alleged: "First. This defendant admits that he is the owner of the fee of certain premises in the city of New York, commonly known as No. 445 West Thirty-ninth street, and this defendant, upon information and belief, denies each, all and every the other allegations in said complaint contained."

Held, that the provision of the answer was not a denial of the defendant's ownership of the premises at the time mentioned in the complaint, but would be regarded rather as an admission of that fact. *KEATING v. MOTT*..... 156

7. — *Amendment substituting an allegation of partial performance of a contract for one of complete performance — a referee may allow it on the trial.*] A referee appointed to hear and determine the issues arising in an action has power, upon the trial thereof, to permit the answer of one of the defendants, which alleges complete performance by such defendant of a building con-

PLEADING — Continued.

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tract. to be amended by alleging performance of the contract, except in certain specified particulars, performance of which has been waived by the other party to the contract. Such an amendment does not substantially change the cause of action. *GRAVES ELEVATOR CO. v. PARKER CO.*..... 456

8. — *General allegations in a pleading will be disregarded where they are shown to be untenable by the specific allegations.*] Where a complaint, after setting forth general allegations, which, if they stood alone, might be sufficient to sustain the complaint on demurrer, goes further and alleges specific facts from which it is made to appear that the ground or theory upon which the plaintiff made the general allegations is untenable, the general allegations will be disregarded. *PEOPLE EX REL. HART v. GOODRICH*..... 445

9. — *Consolidation of two actions — objection that service of a new complaint and answer was not ordered — when waived.*] *Semble*, that where an order consolidating two actions does not direct the service of a new complaint and answer, the defendant must raise that objection by an appeal from the order and cannot raise it for the first time upon the trial of the consolidated action. *PRITCHARD v. EDISON EL. ILLUMINATING CO.*..... 178

10. — *Action by an administrator — demurrer that he has not legal capacity to sue.*] A complaint in an action brought by an administrator is not demurrable on the ground that the plaintiff has not legal capacity to sue, where it does not appear upon the face of the complaint that there is any defect in his appointment as administrator. There is a decided difference between a capacity to sue and the right to maintain an action.

SECOR v. TRADESMEN'S NATIONAL BANK..... 294

— Action for specific performance of a contract and in default thereof for its revocation and the restoration of the parties to their previous condition — who are proper parties to such an action — when the complaint states a cause of action — allegation as to inadequate remedy at law — offer to pay money payable on specific performance.

INTERNAT. PAPER CO. v. HUDSON RIVER CO...... 56
See EQUITY.

— Specific performance, when granted — what must appear by the complaint — what does not show that the monetary value of a contract cannot be determined — when a complaint asking equitable relief should be sent to the law side of the court — *quære* in case of a demurrer thereto.

GILBERT v. BUNNELL..... 284
See EQUITY.

— Injunction sought by a majority stockholder, restraining the directors of a corporation, minority stockholders, from holding a special meeting or disposing of its assets — the complaint and moving affidavits verified on information and belief, not stating the sources thereof, are insufficient.

GILLETTE v. NOYES..... 813
See CORPORATION.

— Judgment of mortgage foreclosure, entered after an answer was overruled as frivolous — where the order overruling the answer is reversed on appeal the Special Term must vacate the judgment. *HIDDEN v. GODFREY*.. 373
See MORTGAGE.

— Negligence — when the complaint does not authorize the admission of proof that the plaintiff was suffering from kidney disease as a result of the accident. *LOCKWOOD v. TROY CITY RAILWAY CO.*..... 112
See NEGLIGENCE.

— A defense that necessary parties are not joined is in the nature of a plea of abatement and must be proved. *ULLMAN v. CAMERON*..... 91
See WILL.

— Negligence and trespass — complaint alleging facts establishing both — when a recovery will be sustained on either ground.

WHEELER v. NORTON..... 368
See NEGLIGENCE.

POLICE — In a city.

See MUNICIPAL CORPORATION.

PRACTICE—*Injunction sought by a majority stockholder, restraining the directors of a corporation, minority stockholders, from holding a special meeting or disposing of its assets—the complaint and moving affidavits verified on information and belief, not stating the sources thereof, are insufficient.*

See GILLETTE v. NOYES 818

—*Certiorari to review the refusal of the State Comptroller to revise a franchise tax—the Comptroller should not be required to state the ground of his refusal—motion to amend the writ—failure of the Comptroller to appear on the motion for the writ.*

See PEOPLE EX REL. N. Y. REALTY CORP. v. MILLER..... 116

—*Order to show cause shortening the time of notice of making an application to the court—it does not apply to the inauguration of a new action or proceeding, e. g., the discharge of an imprisoned debtor.*

See MATTER OF QUICK..... 181

—*Venus—a defendant who notices the case for trial, and obtains a postponement of the trial until the next term of court, thereby waives his right to move for a change of venue.*

See COLEMAN v. HAYES 575

—*Contempt proceedings—the testimony of a witness should be taken, not before a referee, but before the court—his attendance required by subpoena or order.*

See PEOPLE EX REL. TUELL v. PAINE..... 308

—*Stay of proceedings in one action not proper in another—an injunction may in a proper case be granted.*

See PURDY v. BAKER 242

—*An order adjudging a party guilty of a criminal contempt must set forth the particular circumstances.*

See RONCORONI v. GROSS..... 366

—*Dismissal of an action for a failure to prosecute it—when it is proper.*

See McMANN v. BROWN..... 249

See FISHER MALTING CO. v. BROWN..... 251

(—*Relating to proceedings by certiorari.*

See CERTIORARI.

—*As to allowance and recovery of costs.*

See COSTS.

—*Relating to proceedings by mandamus.*

See MANDAMUS.

—*Relating to motions and orders.*

See MOTION AND ORDER.

—*Relating to pleadings.*

See PLEADING.

—*Relating to the trial of an action.*

See TRIAL.

PRESCRIPTION—*Title by.*

See ADVERSE POSSESSION.

PRINCIPAL AND AGENT—*Power of an agent of a co-operative fire insurance company to make an oral agreement that it will issue a policy.*

See INSURANCE.

See MASTER AND SERVANT.

PRIVATE WAY—*Obligation to protect one using it.*

See NEGLIGENCE.

PROCEDURE:

See PRACTICE.

PROCESS—*Contempt proceedings—the testimony of a witness should be taken, not before a referee, but before the court—his attendance required by subpoena or order.*

See PEOPLE EX REL. TUELL v. PAINE..... 308

PROMISSORY NOTE:*See* **BILLS AND NOTES.****PROOF:***See* **EVIDENCE.****PROXIMATE CAUSE** — *The proximate cause is the one setting the other cause in operation.**See* **NEGLIGENCE.****PUBLIC ADMINISTRATOR:***See* **EXECUTOR AND ADMINISTRATOR.****PUBLIC STREET:***See* **MUNICIPAL CORPORATION.****PUNCTUATION** — *Of a will — when disregarded.**See* **WILL.****PURCHASE** — *Of personal property.**See* **SALE.**— *Of real property.**See* **VENDOR AND PURCHASER.****PAGE.**

RAILROAD — *Right to occupy a city street acquired under a resolution of the common council — a failure to occupy the whole length of the street is an abandonment — passage of a subsequent resolution authorizing the use of the portion not occupied — a provision in the subsequent resolution authorizing the common council to revoke it at its pleasure is reasonable — the ownership of the fee of the street is immaterial.* 1. Prior to 1850 the Oswego and Syracuse Railroad Company constructed a railroad between the cities of Oswego and Syracuse. The charter of the city of Oswego and the general statutes relating to railroads prohibited the railroad company from laying its tracks upon the streets of the city without its consent. In 1854 the common council of the city of Oswego passed a resolution authorizing the railroad company to lay its tracks upon Water street, including that portion thereof north of Bridge street. In 1855 the railroad company constructed its tracks upon Water street south of Bridge street, but did not attempt to lay tracks on that portion of the street lying north of Bridge street nor did the city request it to do so.

In 1868 the railroad company applied to the common council for permission to extend its tracks on Water street north of Bridge street and also to occupy certain other streets. The common council granted the application upon certain conditions which were so onerous that the railroad company did not avail itself of the permission.

In 1870 the railroad company again applied for permission to extend its tracks on Water street north of Bridge street. The common council passed a resolution granting the desired permission upon condition that the railroad company would pave and grade the street and keep it in good order and condition. The resolution further provided: "This permission to remain in force and effect during the pleasure of the Common Council."

Immediately after the passage of this resolution the railroad company laid tracks on Water street north of Bridge street and continued to operate the same until 1901, when the common council assumed to rescind the permission given by the resolution of 1870, and directed the railroad company to remove the tracks laid pursuant thereto.

Held, that the railroad company had, prior to 1870, abandoned the right which it had acquired under the resolution of 1854 to lay its tracks upon Water street north of Bridge street, and that its right to continue to maintain the tracks upon that portion of Water street was governed entirely by the resolution of 1870;

That the statutory provisions, requiring the consent of the city to the use of its streets for railroad purposes, empowered the city to impose upon the railroad company in consideration of such consent any and all reasonable conditions;

That the railroad company having accepted the resolution of 1870 without objection, the rights which it acquired thereunder were burdened by all the conditions specified therein;

RAILROAD — Continued.

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That the provision in the resolution, "this permission to remain in force and effect during the pleasure of the Common Council," was reasonable, and that it was lawful for the common council, under such provision, to rescind the resolution of 1870 and annul the rights which the railroad company acquired thereunder, notwithstanding the fact that the railroad company had duly performed all the obligations which the resolution imposed upon it respecting the care of Water street;

That it was not important whether the fee of Water street was in the State of New York or in the city of Oswego or in the abutting owners, as, in any event, the city of Oswego had control and jurisdiction over it.

D., L. & W. R. R. Co. v. CITY OF OSWEGO. 551

2. — *Carrier—when an exemption from liability does not apply—the burden of showing negligence is on the shipper.*] A provision in a contract, under which goods were shipped by rail, that no carrier or party in possession thereof should "be liable for any loss thereof or damage thereto by * * * changes in weather, heat, frost, wet or decay," does not relieve the carrier or a party in possession of the goods from liability to the shipper if, through their negligence, the goods sustain damage from any of the causes mentioned in the contract, but imposes upon the shipper the burden of establishing that the damage was due to such negligence.

THYLL v. NEW YORK & LONG BRANCH R. R. Co. 518

3. — *Objection that evidence received generally is not admissible as to one of the defendants—it must be taken at the trial.*] Where it appears that the railroad company to whom the goods were first delivered, delivered them to another railroad company and that when the goods were finally delivered by the latter railroad company to the shipper they were found to be damaged by moisture, and on the trial of an action brought by the shipper against both the railroad companies to recover such damages, the shipper offers in evidence a letter written by a representative of the first mentioned railroad company stating that the goods were delivered by it to the other railroad company in good order and condition and such letter is received in evidence generally, without objection, the last-mentioned railroad company cannot successfully contend, for the first time upon appeal, that the letter was not admissible as against it. *Id.*

4. — *Liability for damages to goods occurring after possession thereof has been demanded.*] Where it appears that the second railroad company received the goods on July 6, 1901, and did not deliver them to the shipper until July 25, 1901, although the shipper inquired for them several times during the interval and was informed that they had not arrived, such railroad company is liable for all damages sustained by the goods during this interval. *Id.*

5. — *Evidence establishing negligence.*] What evidence is sufficient to justify a finding that during this interval the goods sustained damage from moisture in consequence of the negligence of the second railroad company, considered. *Id.*

6. — *Railroad Commissioners—certificate of "convenience and a necessity."*] On an application by a railroad company to the Board of Railroad Commissioners for a certificate under section 59 of the Railroad Law (Laws of 1890, chap. 565, as amended) that "public convenience and a necessity require the construction of said railroad as proposed in said articles of association," the board is confined to the approval or disapproval, in whole or in part, of the route specified in the articles of incorporation.

PEOPLE EX REL. N. Y. C. & H. R. R. Co. v. COMBS. 126

7. — *Power of the board to authorize a change of route from that specified in the articles of incorporation.*] The board has no power to grant a certificate that public convenience and necessity require the construction of the railroad "as proposed in the articles of association of said company, provided that said railroad shall be built upon private right of way and not in the highway, except through cities, villages and hamlets on its route."

Quære, whether the certificate may be granted as to any other route than the one proposed in the articles of association—except as it may limit the certificate to a part only of such route. *Id.*

RAILROAD — Continued.

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8. — *A railroad must use reasonable diligence to furnish an adequate number of freight cars.*] It is incumbent upon a railroad company to exercise reasonable care and diligence to furnish cars adequate for the transportation of freight tendered to it, but it is not obliged to discriminate in favor of a particular shipper, where the demands upon its transportation facilities exceed its capacity and the anticipated or usual calls upon it.

STROUGH v. N. Y. CENTRAL & H. R. R. Co. 584

9. — *Increase of the freight rates pending a failure to furnish cars.*] Where the neglect of a railroad company to furnish a shipper with sufficient cars for the transportation of freight which he desires to ship is not unreasonable, and, while the shipper is endeavoring to secure the necessary cars, the railroad company makes a reasonable increase in its freight tariff for the particular class of freight in question, the shipper, who has paid such increased charge, cannot recover such increase from the railroad company. *Id.*

10. — *Payment of an increased freight rate with knowledge that ten days' notice of the increase had not been given as required by the Interstate Commerce Law.*] A shipper who voluntarily and without objection pays an increased freight rate upon the goods shipped by him, with knowledge that the railroad company had not given the ten days' notice of the change in the freight rates as required by the Interstate Commerce Act, is not entitled to recover from the railroad company the excess freight charge. *Id.*

— Railroad bonds registered in the name of a charitable corporation — the registration changed to bearer under an unauthorized transfer by its treasurer and a forged resolution — liability to the charitable corporation of the railroad company and of a brokerage house which witnessed the transfer — liability of the brokerage house to the railroad company.

CLARKSON HOME v. CHESAPEAKE & O. R. Co. 491
See CORPORATION.

— Destruction of freight in a railroad freight house by fire — it does not establish negligence on the part of the railroad company — exemption in a bill of lading from liability for loss by fire. VAN AKIN v. ERIE R. R. Co. 23
See NEGLIGENCE.

— Injury on.
See NEGLIGENCE.

RATIFICATION — Of the term of employment prematurely created.
See MUNICIPAL CORPORATION.

— *What is essential to a ratification of the transfer by a trustee of a mortgage owned by him to the trust fund.*
See TRUST.

REAL PROPERTY — Fraudulent conveyance — real property purchased with money advanced by a daughter of the grantee — oral understanding that the property should belong to the daughter — when conveyances of the property to a church corporation and by the church corporation to a third party will be set aside as fraudulent — mortgage executed by the third party.

See LEARY v. CORVIN. 544

— *Agreement by a vendor of lands to repurchase the premises "at the end of three (3) years — the vendee has a reasonable time thereafter in which to elect to reconvey — what is a reasonable time — a delay of five years — effect of a sale of part of the premises by the vendee.*

See MAIER v. REBSTOCK. 587

— *Contract to share in the profits of a purchase of real property — oral agreement by one party to give his interest therein to the other, who assumed the incumbrances on the property — enforced against the party transferring his interest and against his undisclosed assignee.*

See SMITH v. KISSEL. 235

— *Trust giving the beneficiary the right, on notice to the trustee that he desires to use the trust fund in his business, to have such principal — the title to the trust fund, whether real or personal, vests in the beneficiary — creditor's action to enforce a judgment against the fund.*

See ULLMAN v. CAMERON. 91

REAL PROPERTY — Continued.

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- Removal of steel beams from a building existing on real property at the time of the execution of a mortgage thereon — right of the mortgagee to sue therefor without alleging insolvency on the part of the mortgagor.
See OGDEN LUMBER CO. v. BUSSE..... 143
- Mechanic's lien — it attaches, where the contractor fails, and the owner completes the building, to the amount remaining due after deducting the cost of completing the building.
See NEW JERSEY STEEL & IRON CO. v. ROBINSON.... 436
- What continuity of use of a dam is sufficient to establish a prescriptive right to flood land, and is inconsistent with an intention to abandon that right.
See HALL v. STATE OF NEW YORK.. 96
- Covenant prohibiting the erection of a tenement house on land conveyed — an apartment house does not come within its prohibition.
See KITCHING v. BROWN..... 160
- Telephone poles on a rural highway — they constitute an added burden on the fee thereof — injunction.
See GRAY v. NEW YORK STATE TELEPHONE CO.. 89

RECEIVER — Approval by the Attorney-General of a contract for the employment and compensation of attorneys and counsel by receivers — not compelled by mandamus — purpose of section 4 of chapter 60 of the Laws of 1902.] Section 4 of chapter 60 of the Laws of 1902 provides as follows: "The receiver may employ not to exceed one counsel and may make such payment upon account for legal services during the progress of the receivership as shall be just and proper, but no such payment on account shall be made to any counsel except upon the approval thereof in writing by the attorney-general, and such payments shall be subject to the order of the court in whole or in part upon the final settlement of the receiver's accounts to the same extent as the accounts of general assignees are subject to revision and allowance; but no compensation shall be allowed to an attorney for a receiver unless an agreement for his compensation has been made in writing upon the approval of the attorney-general. Additional counsel shall be employed only upon the written approval of the attorney-general."

Held, that two things were sought by the section: (1) To limit the payments on account for legal services during the progress of the receivership to such as are approved in writing by the Attorney-General; (2) to prohibit the allowance of compensation to an attorney "unless an agreement for his compensation has been made in writing upon the approval of the attorney-general;"

That the section was not susceptible of the construction that the approval required from the Attorney-General relates to the necessity of employing an attorney and counsel, and that if the necessity of employing an attorney and counsel be conceded, it is the duty of the Attorney-General to approve a contract of employment in which compensation is provided for, generally, without in any way fixing or limiting the amount thereof;

That the Attorney-General should not be required by mandamus to approve a contract made by a receiver with an attorney and counsel selected by him.

Quære, as to the constitutionality of the statute.

MATTER OF CANDEE v. CUNNEEN..... 71

— Fraternal beneficiary corporation of the State of Indiana — attachment by a beneficiary of a "relief fund" deposited in bank in the State of New York — right thereto of the attaching beneficiary as against receivers of the corporation appointed in Indiana and in New York — such fund is not impressed with a trust. NATIONAL PARK BANK v. CLARK..... 262

See INSURANCE.

— Receiver in a matrimonial action — effect of the order appointing him not requiring him to give a bond — it does not excuse the husband for refusing to deliver his property to the receiver. MATTER OF SPIES..... 175

See HUSBAND AND WIFE.

RECEIVING STOLEN MONEY — *Delivery to an attorney by his client (the thief) of money which the attorney deposits to his credit in a bank — proof that the attorney failed to deliver it to a receiver of the thief's property — the thief, not an accomplice of his attorney — extent to which the evidence of the thief, if an accomplice, must be corroborated — declaration of the attorney as to the thief's methods — reiteration of a charge not required.*

See PEOPLE v. AMMON..... 205

REFERENCE — *Referee's report — verbal error in, not corrected on appeal.*
The question whether a referee, who, in his report, stated, "I further find and report in making such statement that no proof of the profits so charged the defendants could have been made or received by them but for the use by them of the machines in question," intended to say "part" instead of proof cannot be considered on an appeal from an order refusing to confirm the report. The remedy is in the court below.

NEW YORK BANK NOTE CO. v. HAMILTON CO..... 427

— Amendment substituting an allegation of partial performance of a contract for one of complete performance — a referee may allow it on the trial.

GRAVES ELEVATOR CO. v. PARKER CO..... 456
See PLEADING.

— Contempt proceedings — the testimony of a witness should be taken, not before a referee, but before the court.

PEOPLE EX REL. TUELL v. PAINE..... 803
See CONTEMPT.

REGISTRATION — *Of railroad bonds.*

See BOND.

REPRESENTATION — *Fraudulently made.*

See FALSE REPRESENTATION.

RES IPSA LOQUITUR — *When the principle is applicable.*

See NEGLIGENCE.

RESCISSION — *Of a contract.*

See CONTRACT.

— *Of a sale of personal property.*

See SALE.

RETAINER — *Of an attorney.*

See ATTORNEY AND CLIENT.

REVOCATION — *Of continuing guaranty of payment of notes.*

See CONTRACT.

— *Of an order for goods before its acceptance.*

See SALE.

RIPARIAN RIGHT — What continuity of use of a dam is sufficient to establish a prescriptive right to flood land, and is inconsistent with an intention to abandon that right. HALL v. STATE OF NEW YORK..... 96

See ADVERSE POSSESSION.

RULE — *Of a court.*

See COURT.

[*See* Table of Rules cited, *ante*, in this volume.]

SALE — *Warranting a "machine to do good work, to be well made, of good materials, and to be durable if used with proper care" — the vendor is not liable for personal injury caused to the vendee by the breaking of the gearing while in use — general and special warranty, distinguished.* 1. A corn husker and shredder was fitted with a lever, by means of which the rollers could be stopped for the purpose of cleaning them when clogged. The machine was sold by the manufacturer under a contract containing the following clause: "It is distinctly understood that the above mentioned machine is purchased subject to the following warranty, and no other: * * * McCormick

SALE—Continued.

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Harvesting Machine Co. warrants this machine to do good work, to be well made, of good materials, and to be durable if used with proper care."

The rollers having become clogged while it was in use by one of the vendees, he pressed the lever and, the rollers having stopped, started to clean them. Suddenly, and without warning, the rollers began to revolve, and his hand was caught therein and injured. It appeared that the accident was caused by the breaking of a part of the gearing by which the rollers were made to revolve.

Held, that the manufacturer of the machine was not liable under its warranty for the injuries sustained by the vendee, as the warranty was not a special, but a general one, and as the accident was not one which was a natural or probable result of a breach of that warranty;

That, even if the warranty was in legal effect a special warranty, the manufacturer would not be liable for the injuries, as it is not enough to authorize the recovery of all consequential damages that the warranty should be special, but in addition thereto the nature of the warranty must be such as to indicate that the damage suffered was contemplated by the contract of warranty. *BIRDSINGER v. MCCORMICK HARVESTING M. Co.*..... 85

2. — *Measure of damages.*] *Semble*, that the liability created by the warranty (whether construed as special or general) did not extend beyond the obligation to make good to the vendee the machine as warranted. *Id.*

8. — *Contract for the sale of old material—a clause therein "I reserve the right, however, to keep whatever I want of the iron, safes and stone"—it may be explained by proof of the oral negotiations—the vendor cannot, without specifying particular articles, refuse to deliver any of the property.*] A contract was created by the acceptance of the following offer: "I herewith beg to offer you all the old safes, iron or any other metal now forming part of the old Stock Exchange Vaults, for the sum of Eight Dollars and fifty cents (\$8.50) per ton of 2,000 pounds, and the granite at 25 cts. per cubic foot, all to be delivered on the sidewalk and to be carted away by you. I reserve the right, however, to keep whatever I want of the iron, safes and stone.

"Payment \$1,000.00 before delivery of any material, successive payments of \$1,000.00, as enough material is delivered to make up the respective amounts."

Held, that the words, "I reserve the right, however, to keep whatever I want of the iron, safes and stone," were sufficiently ambiguous to justify the admission, for the purpose of explaining the intention of the parties, of evidence of the verbal negotiations that led up to the contract and of evidence of conversations had between the parties immediately after the execution of the contract;

That it was intended by the provision in question that the vendor should have the right to exclude from the contract any special article included within the general description of the property sold, but that, in order to exercise this right, it was necessary that the vendor designate the specific article which he desired to exclude from the contract;

That the provision in question did not entitle the vendor, without specifying any article which he wished to exclude from the contract, to refuse to deliver to the vendee any of the property sold.

N. Y. HOUSE WRECKING Co. v. O'Rourke...... 217

4. — *Contract to manufacture and deliver goods "in every way equal to a model"—there is no warranty which survives acceptance.*] A contract to manufacture and deliver, at a specified price for each one, a number of wrenches to be made in a first class manner in every way equal to a model, constitutes a contract to manufacture and deliver and not a sale by sample, and there is no warranty express or implied which survives the acceptance of the wrenches by the vendee.

If the vendor tenders wrenches inferior in quality to the model submitted, the vendee may refuse to accept them, and recover damages. He cannot, however, accept them and hold the vendor liable in damages because of the inferior quality of the wrenches.

IDEAL WRENCH Co. v. GARVIN MACHINE Co...... 187

5. — *Recovery of sum paid by the vendee to the vendor for tools which were defective.*] Where the contract provided that the vendee should pay the

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vendor \$1,500 for making the tools to be used in the manufacture of the wrenches, and that after the completion of the contract such tools should belong to the vendee, if the tools manufactured by the vendor are defective and are not accepted by the vendee, the latter is entitled to recover the \$1,500. *Id.*

6. — *Recovery of payment applicable to the last delivery.*] Where the vendee, at the time of the execution of the contract, paid the vendor \$500 to apply upon the last 1,000 of the wrenches, and the same are not delivered, the vendee is entitled to recover that sum. *Id.*

7. — *Measure of damages for a failure to deliver the goods contracted for.*] The measure of damages for a failure on the part of a manufacturer to manufacture and deliver articles which he has agreed to manufacture and deliver, is, where the articles in question have a market value, the difference between the market value and the contract price. If the articles have no market value, the measure of damages is the difference between what would have been the value of the articles to the vendee if they had been delivered and the price which he was to pay therefor. *Id.*

8. — *Sale of merchandise — when representations of the vendor as to its quality constitute a warranty.*] Where, at the time of a sale of merchandise, its quality is known to the vendor, but not to the vendee, and the latter is unable to inspect it, the representations made by the vendor as to the quality of the merchandise are to be regarded as a warranty.

Consequently, where a corporation having in its storehouse at Sioux City, Iowa, a quantity of eggs, sells five carloads of such eggs in the city of New York to persons who had no representative at Sioux City, and were, therefore, unable to inspect the eggs, a representation made by the corporation that the eggs are of a certain quality constitutes a warranty.

EGBERT v. HANFORD PRODUCE CO. 252

9. — *The acceptance of the goods will not prevent a recovery for a breach of the warranty.*] In such a case the vendees may order the entire five carloads of eggs, and, if there has been a breach of the warranty as to quality, recover from the vendor the difference between the amount which they realized on the sale of the eggs and the amount which they would have realized had the quality thereof been as represented. *Id.*

10. — *Effect of ordering further installments after the first has been found to be unsatisfactory.*] The fact, therefore, that when the first carload of eggs was delivered, the vendees found that they were not of the quality represented, and that notwithstanding this knowledge they subsequently ordered the shipment of the other carloads, which also proved to be unsatisfactory, does not deprive the vendees of their right to recover damages for the breach of the warranty. *Id.*

11. — *When the defective quality of a part will not justify the rejection of the remainder.*] The fact that the quality of the first carload was not as represented would not justify the vendees in refusing to receive the other carloads, it appearing that the eggs were composed of five separate lots, which were separately insured, and were represented by five distinct warehouse receipts. *Id.*

12. — *Right of a vendee to revoke an order for goods before its acceptance.*] An order for the shipment of goods may be revoked by the party giving it at any time before it has been accepted by the party to whom it is addressed.

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— *Of real property.*

See VENDOR AND PURCHASER.

SAVINGS BANK:

See BANKING.

SCAFFOLD — *Injury to a servant falling from a scaffold built by an independent contractor.*

See NEGLIGENCE.

— *Constructed by the employee falling therefrom — liability of the master.*

See NEGLIGENCE.

SECURITY :

See BOND.

SEPARATION — *Of husband and wife.*

See HUSBAND AND WIFE.

SERVANT :

See MASTER AND SERVANT.

SERVICES — *Lien for.*

See LIEN.

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SESSION LAWS — 1848, chap. 819 — *Conveyance of land to a hospital by a municipality — when the Constitution prohibits the Legislature from authorizing it — the fact that the land was thereby made subject to tax does not afford a consideration.*

See MOUNT SINAI HOSPITAL v. HYMAN..... 270

— 1868, chap. 858, § 5 — *Conveyance of land to a hospital by a municipality — when the Constitution prohibits the Legislature from authorizing it — the fact that the land was thereby made subject to tax does not afford a consideration.*

See MOUNT SINAI HOSPITAL v. HYMAN..... 270

— 1881, chap. 189 — *Conveyance of land to a hospital by a municipality — when the Constitution prohibits the Legislature from authorizing it — the fact that the land was thereby made subject to tax does not afford a consideration.*

See MOUNT SINAI HOSPITAL v. HYMAN..... 270

— 1890, chap. 565, § 59 — *Railroad Commissioners — certificate of "convenience and a necessity" — power of the board to authorize a change of route from that specified in the articles of incorporation.*

See PEOPLE EX REL. N. Y. C. & H. R. R. Co. v. COMRS..... 126

— 1892, chap. 553 — *Conveyance of land to a hospital by a municipality — when the Constitution prohibits the Legislature from authorizing it — the fact that the land was thereby made subject to tax does not afford a consideration.*

See MOUNT SINAI HOSPITAL v. HYMAN..... 270

— 1892, chap. 686, §§ 21, 22 — *Publication of election notices — effect of more than one paper being designated by the board of supervisors — in fixing the compensation therefor, the supervisors are not limited by the prices fixed by section 21 of the County Law.*

See MATTER OF FORD v. SUPERVISORS..... 119

— 1893, chap. 338, §§ 50, 51, 52, 53 — *Cider vinegar — that part of section 50 of the Agricultural Law fixing the percentage of acetic acid which it shall contain is unconstitutional — the remainder of the section and sections 51, 52 and 53 of the statute are constitutional.*

See PEOPLE v. WINDHOLZ..... 569

— 1893, chap. 686 — *Power of an executor to compromise a claim against his testator's estate — the Surrogate's Court may authorize it.*

See MATTER OF GILMAN..... 462

— 1896, chap. 547, §§ 72, 73 and 129 — *Trust giving the beneficiary the right, on notice to the trustee that he desires to use the trust fund in his business, to have such principal — the title to the trust fund, whether real or personal, vests in the beneficiary — creditor's action to enforce a judgment against the fund.*

See ULLMAN v. CAMERON..... 91

— 1896, chap. 626, §§ 2, 3 and 4 — *The employment of an architect by the commissioner of correction in the city of New York is authorized by chapter 626 of the Laws of 1896 — term of such employment — a premature employment made effective by ratification.*

See WITHERS v. CITY OF NEW YORK..... 147

— 1896, chap. 908, § 198 — *Certiorari to review the refusal of the State Comptroller to receive a transfer tax — the Comptroller should not be required to state the grounds of his refusal — motion to amend the writ.*

See PEOPLE EX REL. N. Y. REALTY CORP. v. MILLER..... 116



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— 1897, chap. 415, § 18 — *Negligence — section 18 of the Labor Law applies to a scaffold used for erecting machinery in a factory — injury to a servant from the falling of a scaffold which an independent contractor, employed by the injured servant's master, was obliged to build, but which was built by the injured servant pursuant to directions from his foreman — the master is not liable.*

See *WINGERT v. KRAKAUER* 223

— 1897, chap. 415, § 18 — *Scaffold constructed by the employee falling therefrom — the master is not liable although the scaffold does not comply with section 18 of chapter 415 of the Laws of 1897.*

See *ROTONDO v. SMYTH* 158

— 1897, chap. 612, §§ 91, 93 — *Crediting by a bank to a customer's account the proceeds of a note discounted — it is not a payment for the note — the bank does not become a holder for value — effect of notice to the bank that there was an entire failure of consideration for the note before it pays over the money — how far notice of dishonor is notice of such infirmity in the paper.*

See *ALBANY COUNTY BANK v. PEOPLE'S ICE Co. (No. 1)* 47

— 1897, chap. 665 — *Land taken to extend Riverside drive in New York city — award embracing the value of the land and interest thereon to the date of the report — the landowner is entitled to interest on the entire award — when the rule that an excessive demand is ineffectual to set interest running does not apply.*

See *MATTER OF CITY OF N. Y. (IN RE DORSETT)* 523

— 1898, chap. 257 — *Conveyance of land to a hospital by a municipality — when the Constitution prohibits the Legislature from authorizing it — the fact that the land was thereby made subject to tax does not afford a consideration.*

See *MOUNT SINAI HOSPITAL v. HYMAN* 270

— 1900, chap. 166 — *Conveyance of land to a hospital by a municipality — when the Constitution prohibits the Legislature from authorizing it — the fact that the land was thereby made subject to tax does not afford a consideration.*

See *MOUNT SINAI HOSPITAL v. HYMAN* 270

— 1901, chap. 308 — *Cider vinegar — that part of section 50 of the Agricultural Law fixing the percentage of acetic acid which it shall contain is unconstitutional — the remainder of the section and sections 51, 52 and 53 of the statute are constitutional.*

See *PEOPLE v. WINDHOLZ* 569

— 1902, chap. 60, § 4 — *Receiver — approval by the Attorney-General of a contract for the employment and compensation of attorneys and counsel by receivers — not compelled by mandamus — purpose of section 4 of chapter 60 of the Laws of 1902.*

See *MATTER OF CANDEE v. CUNNEEN* 71

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SHIPPING — Marine insurance — restriction to "New Haven harbor and adjacent inland waters," construed — it does not authorize the use of the vessel in Bridgeport harbor. *KIRK v. HOME INSURANCE Co.* 26

See *INSURANCE*.

SPECIAL FRANCHISE TAX:

See *TAX*.

SPECIFIC PERFORMANCE — Equity — action for specific performance of a contract and in default thereof for its revocation and the restoration of the parties to their previous condition — it rests in the discretion of the court — who are proper parties to such an action — when the complaint states a cause of action — allegation as to inadequate remedy at law — presumption on demurrer — offer to pay money payable on specific performance.

See *INTERNAT. PAPER Co. v. HUDSON RIVER Co.* 56

See *EQUITY*.

— Equity — specific performance, when granted — what must appear by the complaint — what does not show that the monetary value of a contract

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cannot be determined — when a complaint asking equitable relief should be sent to the law side of the court — *quere*, in case of a demurrer thereto.

GILBERT v. BUNNELL..... 284
See EQUITY.

SPYING — *Upon another's business.*

See CONSPIRACY.

STAY — *Of proceedings in one action not proper in another — an injunction may in a proper case be granted.]* Where an action brought in the Supreme Court in Schuyler county by Baker against one Purdy, and an action at law brought in the Supreme Court in the county of New York by Purdy against Baker are both pending at the same time, a motion made by Purdy in the New York county action for an order staying proceedings in the Schuyler county action is properly denied; such a motion must be made in the Schuyler county action.

Semble, that in a proper case the court might entertain an application for an injunction in one suit to restrain the proceedings in another.

PURDY v. BAKER..... 243

STREET — *In a city.*

See MUNICIPAL CORPORATION.

STRIKE — *When a ground of excuse to a sub-contractor.*

See CONTRACT.

SUBPOENA — *To a witness.*

See PROCESS.

SUPERVISOR — *Of a county.*

See COUNTY.

SURCHARGING — *Accounts of executors and administrators.*

See EXECUTOR AND ADMINISTRATOR.

SURROGATE — *Power of an executor to compromise a claim against his testator's estate.]* 1. Independent of statute, an executor or administrator has the power to compromise and adjust claims made either against or in favor of the estate represented by him; the only risk which he assumes in so doing is that unless his action in this respect is sustained by a court having jurisdiction of the subject-matter, he will be subjected to a personal liability.

MATTER OF GILMAN. 462

2. — *The Surrogate's Court may authorize it.]* Section 2719 of the Code of Civil Procedure, as amended by chapter 686 of the Laws of 1898, providing: "The surrogate may authorize the executor or administrator to compromise or compound a debt or claim on application and for good and sufficient cause shown," confers upon a surrogate the power to permit an executor or administrator to compromise and compound a claim against the estate. *Id.*

3. — *When a payment of \$60,000 to settle a claim for an entire estate of \$2,000,000 is proper.]* Under what circumstances it is proper for a surrogate to authorize the administrators of an estate amounting to nearly \$2,000,000 to compromise for \$60,000 a claim presented against the estate for the entire amount thereof, considered. *Id.*

4. — *Appeal from a surrogate's order — in order to bring up the facts for review the notice should show an intention to do so.]* *Semble*, in view of the provisions of the Code of Civil Procedure allowing an appeal from a decree or order of the Surrogate's Court to be taken upon questions of law or upon the facts, and conferring on the appellate court, if the appeal is taken on the facts, the same power to decide the questions of fact which the surrogate had, that an appeal from an order or decree of the Surrogate's Court will be treated as one upon questions of law unless the notice of appeal contains a statement that the appellant desires to review the facts. *Id.*

— Letters of administration — they will not be granted to the public administrator on the application of a nonresident alien — the public adminis-

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trator or the next of kin must petition therefor—a claim against an estate within the jurisdiction of a surrogate is property within his county.

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See EXECUTOR AND ADMINISTRATOR.

— Letters of administration—they cannot be granted to a non-resident alien nor to a resident designated by him—he is not “contingently” entitled to letters—who is—the public administrator is entitled either absolutely or contingently. MATTER OF FERRIGAN..... 376
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— An action is not maintainable by an administrator on a note deposited with a trust company pursuant to section 2596 of the Code of Civil Procedure. DITMAS *v.* MCKANE..... 344
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— When a decree on an accounting by the trustee does not, nor does the denial of a motion to open it, estop the *cestui que trust*.
 MATTER OF L. I. L. & T. CO. (IN RE GARRETSON)..... 1
See TRUST.
See EXECUTOR AND ADMINISTRATOR.

SURVIVORSHIP—*Between partners.*

See PARTNERSHIP.

TAX—*Certiorari to review the refusal of the State Comptroller to revise a franchise tax—the Comptroller should not be required to state the grounds of his refusal.*] 1. Section 198 of the Tax Law (Laws of 1896, chap. 908), relative to certiorari proceedings to review the action of the State Comptroller in refusing to revise and readjust a franchise tax imposed upon a corporation, nowhere authorizes or requires the Comptroller to return, in obedience to the writ, the grounds of his refusal. If the writ contains such a provision it may be stricken out on motion as unauthorized.

PEOPLE EX REL. N. Y. REALTY CORP. *v.* MILLER..... 116

2. — *Motion to amend the writ—failure of the Comptroller to appear on the motion for the writ.*] Where the petition for the writ includes a prayer that the Comptroller be directed to return the grounds of his refusal, the Comptroller, by neglecting to appear upon the return day of the motion for the writ, does not, if such a provision is inserted in the writ, waive his right to move to strike it out; but the court should, before hearing him upon the motion, first require him to excuse his default. *Id.*

3. — *Scope of the statutory writ of certiorari to review an assessment.*] The statutory writ of certiorari to review the action of a board of assessors in making an assessment for taxation possesses all the functions of the common-law and Code writs of certiorari, and in addition thereto authorizes a rehearing of the question at issue and the introduction of additional proofs bearing thereon. The enlarged scope of the writ does not change or alter its functions as a writ of review. PEOPLE EX REL. 23D STREET R. CO. *v.* FEITNER. 518

4. — *Appointment of a referee to take testimony—it does not preclude a decision that upon the face of the return the tax was invalid.*] The fact that the court, when the case comes on for trial upon the petition, writ and return, decides that testimony is necessary for the proper disposition of the matter, and appoints a referee to take testimony and report to the court his conclusions of law and findings of fact, does not preclude it, where the relator offers no testimony before the referee, but rests its case upon the return, from determining, upon a motion to confirm the referee's report, that it appeared upon the face of the return that the tax was illegal and void. *Id.*

5. — *Assessment of the capital stock and surplus of a corporation—the debts of the corporation should be deducted.*] When assessing the capital stock and surplus of a corporation, the corporation is entitled to have deducted from its personal property the amount of its debts; bonds issued by the corporation constitute an indebtedness. *Id.*

6. — *Meaning of “capital stock.”*] Capital stock, as that term is used in the Tax Law, does not mean share stock, but is limited to the actual money or property paid in and possessed by the corporation as such. *Id.*

TAX— *Continued.*

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7. — *The assessors have no power to determine the value of a special franchise.*] The assessors have no power to determine the assessable value of a special franchise possessed by the corporation. *Id.*

8. — *They cannot disregard an unimpeached verified statement filed by the corporation.*] Where the corporation delivers to the assessors a statement of its financial condition, verified by the secretary, upon the face of which it appears that the corporation has no personal property subject to tax, the assessors have power to examine the officers of the corporation under oath and to require a fuller statement of its property. If, however, they neglect to do this, they are not at liberty to disregard the verified statement. *Id.*

TELEPHONE POLES :

See EMINENT DOMAIN.

TENEMENT HOUSE :

See VENDOR AND PURCHASER.

TERMS — *Imposed on granting leave to bring in an additional defendant.*

See PLEADING.

— *Imposed when granting leave to amend a complaint.*

See PLEADING.

TORT :

See NEGLIGENCE.

TOWN — *Audit by town board — what constitutes an audit — the remedy where there is an error in the audit is by certiorari — a mandamus is improper.*]

1. Contractors for the construction of a road in a town, having used more stone than they had contemplated would be necessary, filed a claim with the town board for the value of the extra stone. The town board having refused to audit the claim, the contractors procured a peremptory writ of mandamus requiring them to do so. Pursuant to the writ the town board met and the town clerk produced the record touching the matter in controversy together with the original notice of claim. The terms of the contract were then discussed and a motion was carried that the board take action. The record read as follows: "Mr. Haley: I move that the claim be rejected on the ground that it is not a legal claim against the Town of White Plains, and if any extra work was done it is in violation of the express terms of the contract. Seconded by Mr. Matthies. Motion carried. Mr. Haley: I move that if there is nothing further to come before the Board we adjourn. Seconded by Mr. Matthies. Motion carried."

Held, that the action of the town board was a determination upon the merits of the claim and constituted a legal audit thereof;

That the remedy of the contractors was by a writ of certiorari to review the town board's determination of the legal question of liability, and if the town board had committed error to have the claim remanded to that board for audit;

That an application, after the rejection of the claim, for a writ of mandamus to compel the town board to audit the account, resulting, under an alternative writ, in an assessment by a jury of the amount of the contractors' claim and a peremptory writ of mandamus directing the town board to audit and allow the claim at that amount, was not the proper remedy.

PEOPLE EX REL. MCCABE v. MATTHIES. 16

2. — *Test as to whether there has been an audit.*] In auditing a claim the town board acts in a quasi-judicial capacity, and the test whether the action of the town board constitutes a legal audit of the claim depends upon whether they have placed such action upon a decision of the merits of the controversy. *Id.*

3. — *Error in an audit — not corrected by mandamus.*] If a town board has made a legal audit of a claim the court has no power, by mandamus, to correct any error therein, whether the error is on account of a total rejection of the claim based upon a misconception of the legal questions involved, or whether it is because they have allowed the claim at too great or too small a figure. *Id.*

TOWN — *Continued.*

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4. — *Judicial decision — not reviewed by mandamus.*] Mandamus may not be invoked to review a judicial or quasi judicial decision. *Id.*

— *Highway in town.*

See HIGHWAY.

TRADE MARK — *Use of the words "Conserva Di Tomato" not enjoined.*] 1. A merchant who manufactures and sells preserved tomatoes under the description "Conserva Di Tomato," the word "Tomato" being generally understood by Italians to refer to the tomato, is not entitled to an injunction restraining another merchant from using these words to designate similar preserves, although it appears that the word "Tomato" is used only in a small territory in the north of Italy and among Italians in the United States and that there is another Italian name for tomato, to wit, "Pomodoro," which is in more general use than "Tomato."

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2. — *The use of a label calculated to deceive will be enjoined.*] The use by the defendants of a label in imitation of that of the plaintiff, calculated to lead the public, when purchasing the defendants' goods bearing such label, to believe that it is purchasing the plaintiff's goods, will be restrained. *Id.*

TRESPASS — Negligence and trespass — complaint alleging facts establishing both — injury to a water pipe from blasting for a subway, causing the flooding of plaintiff's premises. *WHEELER v. NORTON*..... 368

See NEGLIGENCE.

TRIAL — *Liability of a carrier for damages to goods occurring after possession thereof has been demanded — objection that evidence received generally is not admissible as to one of the defendants — it must be taken at the trial.*

See THYLL v. NEW YORK & LONG BRANCH R. R. CO..... 513

— *Amendment substituting an allegation of partial performance of a contract for one of complete performance — a referee may allow it on the trial.*

See GRAVES ELEVATOR CO. v. PARKER CO..... 456

— *An objection that the issues in an action are triable at law and not in equity cannot be first taken on appeal.*

See CLARKSON HOME v. CHESAPEAKE & O. R. CO..... 491

— *Refusal to allow a plaintiff, who has rested, to reopen his case — when improper.*

See DE GRAFF v. LANG..... 564

— *Of a police captain.*

See MUNICIPAL CORPORATION.

— *Charge of the court in negligence cases.*

See NEGLIGENCE.

— *Place of.*

See VENUE.

TRUST — *Transfer by a trustee of a mortgage owned by him, to the trust fund — it is against public policy — effect of a report by the trustee showing such investment — what is essential to a ratification — when a decree on an accounting by the trustee does not, nor does the denial of a motion to open it, estop the cestui que trust.*] The directors of the Long Island Loan and Trust Company, which in its individual capacity was the owner of a bond and mortgage executed by one Donohue and was also a trustee of certain personal property for the benefit of Lillie G. Sloan, passed the following resolution: "Resolved, That in consequence of the difficulty of procuring satisfactory bonds and mortgages for the uninvested funds held by this Company as Trustee, &c., the following bonds and mortgages, being the property of the Company, shall, after the first of February next, be held for the different trusts, as named below, viz.: Bond of T. Donohue, No. 8, amount, \$7,800, for the Trust of Lillie G. Sloan."

No other transfer of the mortgage was made to the trust fund created for the benefit of Lillie G. Sloan. Thereafter the Long Island Loan and Trust Company brought an action in its own name for the foreclosure of

TRUST — Continued.

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the mortgage and on the foreclosure sale purchased the mortgaged property in its own name.

Held, that the transaction on the part of the trustee in attempting to transfer the mortgage to the trust fund was contrary to public policy;

That a trustee cannot deal, in his own behalf, with the funds of his *cestui que trust*;

That he can neither purchase the trust funds for himself nor exchange them for his own property;

That the *cestui que trust* was entitled to an adjudication that the mortgaged property belonged to the trustee and that the trust fund be made good with interest at six per cent less any income which might have been paid to her;

That a statement in the report made by the trustee to the *cestui que trust* in which the following entry appeared: "February 1, 1893, L. I. L. & T. Co., T. Donohue Mtge. No. 3, \$7,800," did not operate as a ratification of the transaction by the *cestui que trust*;

That where ratification on the part of a *cestui que trust* is set up, it must appear not only that the *cestui que trust* knew all of the facts, but that she had been informed of her rights under the law; that she had been told of the disposition which a court of equity would make under the known facts;

That if the trustee claimed that a decree rendered on a prior accounting by him estopped the *cestui que trust* from attacking the transaction in question upon the subsequent accounting, it was incumbent upon the trustee to show that the question at issue was litigated and determined on the previous accounting;

That, in the absence of such proof, neither the previous decree itself nor the denial of a motion made by the *cestui que trust* to open such decree operated to estop the *cestui que trust* from attacking the unauthorized action of the trustee, although the *cestui que trust* had, on the motion to open the decree, set up the unauthorized action of the trustee;

That the motion to open the decree was addressed to the discretion of the surrogate, and that the denial of such motion did not affect any substantial right of the *cestui que trust*.

MATTER OF L. I. L. & T. CO. (IN RE GARRETSON)..... 1

— Fraternal beneficiary corporation of the State of Indiana — attachment by a beneficiary of a "relief fund" deposited in bank in the State of New York — right thereto of the attaching beneficiary as against receivers of the corporation appointed in Indiana and in New York — such fund is not impressed with a trust. NATIONAL PARK BANK *v.* CLARK..... 262

See INSURANCE.

— *Trustes in bankruptcy.*

See BANKRUPTCY.

— *As to trusts created by will.*

See WILL.

VENDOR AND PURCHASER — Covenant prohibiting the erection of a tenement house on land conveyed — an apartment house does not come within its prohibition.]

1. A deed contained a covenant prohibiting the erection on the land conveyed of any stable of any kind, coal yard, slaughterhouse, meat shop, tallow chandlery, steam engine, smith shop, forge, furnace, brass foundry, nail or other iron foundry, or any manufacturing of glass, gunpowder, starch, glue, varnish, vitriol, ink, petroleum or turpentine, or any cooper's, carpenter's or cabinet maker's shop, or any establishment for tanning, dressing, preparing or keeping skins, hides or leather, or any brewery, distillery, sugar refinery or bakery, or drinking or lager beer establishment, circus, menagerie or public show or exhibition of animals, railroad depot, railroad stable, car engine or *tenement house*, or any other trade, manufactory, business or calling which may be in any way dangerous, noxious or offensive to the neighboring inhabitants.

Held, that the covenant did not prohibit the erection on the premises of three modern apartment houses seven stories high with two apartments on each floor, which cost \$400,000, and were of a character and appearance corresponding with the first-class dwelling houses in the immediate neighborhood;

VENDOR AND PURCHASER—Continued.

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That such houses were not "tenement houses" within the meaning of the covenant. *KITCHING v. BROWN*..... 160

2. — *Agreement by a vendor of lands to repurchase the premises "at the end of three (3) years"—the vendee has a reasonable time thereafter in which to elect to reconvey.*] Where a vendor of lands, contemporaneously with the sale and as part of the consideration therefor, executes and delivers to the vendee the following instrument: "I hereby agree, if at the end of three (3) years you can't sell at an advance to cover six (6) per cent. interest on investment, I will take the land back and refund money, also pay you six (6) per cent. interest and all other expenses connected with transfers, recording, etc." the vendee has a reasonable time after the expiration of the three years specified in the contract in which to elect to reconvey the lands; he is not, however, entitled to await a favorable turn in the market and still hold the vendor liable under the guaranty. *MAIER v. REBSTOCK*..... 587

3. — *Reasonable time.*] What is a reasonable time, in view of all the circumstances, is ordinarily for the jury to determine. *Id.*

4. — *A delay of five years.*] When, in an action brought by the vendee against the vendor, five years after the expiration of the three years specified in the guaranty to recover upon such guaranty, it is a question for the jury to determine whether the vendee, during the three years stipulated in the guaranty, exercised reasonable diligence in attempting to sell the lands and whether the vendor acquiesced in the subsequent delay, appreciating that his liability upon the guaranty still existed, considered. *Id.*

5. — *Effect of a sale of part of the premises by the vendee.*] If the vendee, by a sale, or contract of sale, of an interest in the premises, has obtained partial reimbursement, the vendor's liability upon the guaranty is reduced *pro tanto*. *Id.*

See REAL PROPERTY.

— *Of personal property.*

See SALE.

VENUE — *Action for libel in which a plea in mitigation of damages is interposed—the county in which the publication was made held to be the proper place of trial.*] 1. In an action brought to recover damages for the publication of a libel in a newspaper published in Ulster county, the defendant interposed an answer consisting solely of a plea in mitigation of damages. The action was brought in the county of New York, but there was no averment in the complaint that the libel was published in that county. All the witnesses upon the subject of the plaintiff's damages, with the exception of the plaintiff himself, resided in Ulster county.

Held, that the venue of the action should be changed to Ulster county.

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2. — *A defendant who notices the case for trial, and obtains a postponement of the trial until the next term of court, thereby waives his right to move for a change of venue.*] Where both the parties to an action notice it for trial at a term of court to be held in the county in which the action is brought, and the defendant appears at such term of court and applies for and obtains, on the ground of the illness of a material witness, an adjournment of the trial until the next term of court, he thereby waives his right to move to have the venue changed to another county in order to promote the convenience of witnesses. *COLEMAN v. HAYES*..... 575

VESSEL:

See SHIPPING.

VINEGAR — *Cider vinegar—that part of section 50 of the Agricultural Law fixing the percentage of acetic acid which it shall contain is unconstitutional—the remainder of the section and sections 51, 52 and 53 of the statute are constitutional.*

See PEOPLE v. WINDHOLZ..... 569

VOLUNTARY PAYMENT:

See PAYMENT.

VOTES — *At an election.**See* ELECTION.

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WAIVER — *Venue* — *a defendant who notices the case for trial, and obtains a postponement of the trial until the next term of court, thereby waives his right to move for a change of venue.*

See COLEMAN v. HAYES 575

— *Consolidation of two actions* — *objection that service of a new complaint and answer was not ordered* — *when waived.*

See PRITCHARD v. EDISON EL. ILLUMINATING CO. 178**WARRANTY** — *On a sale of personal property.**See* SALE.

WATERCOURSE — *What continuity of use of a dam is sufficient to establish a prescriptive right to flood land, and is inconsistent with an intention to abandon that right.* HALL v. STATE OF NEW YORK. 96

See ADVERSE POSSESSION.**WAY** — *Obligation to protect one using it.**See* NEGLIGENCE.**WIFE:***See* HUSBAND AND WIFE.

WILL — *Devise of the residuary estate in trust for the testator's children — provision that certain portions of the trust fund be paid to each beneficiary when she attained the age of twenty-five and thirty years, and that upon her death the balance be paid to her appointees, or, in the absence of such appointment, to her issue — devolution of the trust fund where one of the beneficiaries dies before reaching the age of twenty-five years, leaving a husband and child, en.]* 1. The will of Leonard Lewisohn directed his executors to divide his residuary estate, both real and personal, "into such number of equal shares as shall be equal to the number of children who shall survive me, and of my children, who shall have died before me leaving issue who shall survive me, and set apart one of such equal shares for each of my children who shall survive me, and one of such equal shares for the issue of each child of mine who shall have died before me, leaving issue me surviving; and convey, transfer, deliver and pay over one of such equal shares to the issue of each one of my children who shall have died before me leaving issue me surviving, in equal shares, *per stirpes* and not *per capita*, to whom I give, devise and bequeath the same accordingly; and that my said executors set apart one of such equal shares for the benefit of each of my children who shall survive me, and I give, devise and bequeath the same to my said executors and to such of them as shall qualify and act; as trustees to have and to hold each share so set apart for the benefit of a child of mine (or the portion thereof not paid over and transferred to such child as hereinafter directed) upon a separate trust, for the benefit of such person for whom or for whose benefit the same shall have been set apart as aforesaid during his or her natural life, * * * and after paying thereout all lawful expenses and charges to apply the net income from the said trust estate arising from time to time as received, to the use of the person in trust for whom such trust estate shall be held as aforesaid for so long during the life of such person as he or she shall remain under the age of twenty-five years, the income of any such share held in trust for any daughter of mine to be free from the debts, control or interference of any husband she may have; and upon the arrival at the age of twenty-five years of the person in trust for whom such trust estate shall be so held, to convey, transfer, deliver and pay over one equal fourth part of the capital of such trust estate with all gains and increase of capital thereof, if any, in fee simple and absolutely to such person."

The will further provided that thereafter the executors should hold the balance of the trust estate upon a similar trust until the beneficiary should reach the age of thirty years, at which time they were directed to pay to the beneficiary in fee simple one equal third part of the capital of the trust estate then remaining; that thereafter and during the residue of the life of the beneficiary the executors should hold the balance of the trust estate upon a similar trust.

WILL—Continued.

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The will then directed the executors "upon the death of such person in trust for whom such trust estate shall be held, to convey, transfer, deliver and pay over the capital of such trust estate as it shall then exist with all gains and increase of capital thereof, if any, in fee simple and absolutely to such person or persons and in such shares and proportions as the person in trust for whom such trust estate shall have been held shall by will direct and appoint; and in default of such direction or appointment, or in so far as such direction or appointment may not extend or be effectual, to the issue then surviving of such person in trust for whom such trust estate shall have been held, in equal shares *per stirpes* and not *per capita*."

One of the testator's daughters, for whom, pursuant to the will, one-ninth of the residuary estate had been set apart in trust, died intestate before attaining the age of twenty-five years leaving her surviving two children and a husband.

Held, that the testator did not intend that any part of the trust fund should vest absolutely in his surviving children until the arrival of the various periods fixed for distribution, and then intended the trust estate to vest in the surviving children only as to the part to be distributed;

That the one-half of the trust estate designed to be paid over to the testator's deceased daughter in installments payable when she attained the age of twenty-five and thirty years respectively did not vest in such daughter immediately upon the testator's death, and pass to the husband and children of the testator's deceased daughter as her next of kin;

That the provision of the will governing the disposition of the trust fund upon the death of a beneficiary had reference to the death of a child of the testator occurring at any time subsequent to the testator's death and not to the death of a child occurring after such child had attained the age of thirty years;

That the children of the testator's deceased daughter took the entire trust fund under this provision of the will and did not take any part thereof as next of kin of their mother. *LEWISOHN v. HENRY*.....

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2. — *When the punctuation of a will should be disregarded.*] The punctuation of a will must be disregarded if it is in conflict with the testamentary scheme of the testator as gleaned from the provisions of the will, or prevents ascribing to the words employed their ordinary meaning. *Id.*

8. — *Trust giving the beneficiary the right, on notice to the trustee that he desires to use the trust fund in his business, to have such principal—the title to the trust fund, whether real or personal, vests in the beneficiary—creditor's action to enforce a judgment against the fund—when the fact that residuary legatees are not made parties is not a ground of objection—burden of proof that they are alive.*] A testatrix devised all her estate, which consisted entirely of personal property, to her executor, Albert L. Cameron, in trust for the following purposes:

"*Second.* I hereby will and direct the said Albert L. Cameron to pay over to my husband, Charles E. Cameron, semi-annually, all of the income, rents, issues and profits of my said estate, and so much of said principal sum as may be necessary for his support and maintenance for and during the term of his natural life.

"*Third.* I further will and direct that whenever the said Charles E. Cameron shall desire to engage in any business or enterprise, and shall give notice—thus—to the said Albert L. Cameron, that he desires the whole or any part of such principal sum—for such purpose, it is my will and in that case I hereby direct the said Albert Cameron to pay over and deliver to the said Charles E. Cameron the amount so desired by him out of the principal sum so given to him in trust by the first clause hereof."

The will further provided that the trustee should pay all the funds that remained in his hands after the death of Charles E. Cameron to certain residuary legatees.

Held, that a valid trust was created by the 2d clause of the will:

That the provision of the 8d clause of the will giving Charles E. Cameron the right to demand possession of the fund if he desired to engage "in any business or enterprise," was so broad and so personal to the beneficiary that it was equivalent to a direction that he was entitled to possession of the fund whenever he asked for it;

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That if the trust fund consisted of realty, an attempt to give the beneficiary absolute control over the trust fund, would, under sections 72, 73 and 129 of the Real Property Law (Laws of 1896, chap. 547), have rendered the entire trust void and caused the title to the whole property to vest in the beneficiary instead of in the trustee;

That, although the trust fund consisted entirely of personal property, the same principle would be applied;

That a judgment dismissing a complaint, in an action brought by a judgment creditor of the beneficiary to enforce his judgment against the trust fund, would not be sustained upon the ground that the residuary legatees had not been made parties to the action, it appearing that, although that defense was set up in the answer, no evidence was given that the legatees were living and also that the decision of the trial court was placed upon the sole ground that the beneficiary had no property in the trust fund;

That a defense that necessary parties are not joined is in the nature of a plea of abatement and must be proved. *ULLMAN v. CAMERON* 91

4. — *Trust to pay over the income and, in the discretion of the trustee, the principal of a trust fund to the cestui que trust — on the death of the trustee the discretionary power to pay over the principal vests in the court, to be exercised only on proof of the necessity therefor.* The will of a testator provided, "I give and bequeath to my executor hereinafter named in trust for my brother Warren W. Button, all the remainder of my property and estate to be invested, and such portion of the interest and principal as in the judgment of my said executor as* may be proper for his use shall be paid to him annually towards his support; but in no case shall any portion be applied in payment of any judgment, claim or cause of action now or hereafter existing against him, nor upon any claim or demand against him which is not appraised by said executor. My said executor may at any time when he deems it for the interest of my said brother pay over to him the whole or any part of the principal. My said executor may invest at such rate of interest as he may deem best for the security of the principal at less than the legal rate." The executor and trustee died and an administrator with the will annexed was appointed.

Held, that the trust did not terminate upon the death of the trustee, but that it vested in the Supreme Court to be exercised by its appointee or the administrator with the will annexed, the substituted trustee;

That it was the duty of the administrator with the will annexed to pay the income of the trust fund yearly to the *cestui que trust* and so much of the principal thereof as the court, in its discretion, should say was proper and necessary for his support;

That this discretion of the court was not an arbitrary discretion, and could only be exercised upon evidence showing the circumstances and necessities of the *cestui que trust*, and that, in the absence of any proof upon that subject, it was improper for the court to direct the administrator with the will annexed to pay over to the *cestui que trust* the principal of the trust fund.

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— A clause of a will bequeathing a law business, books "and all property pertaining to my business" does not include a debt due to the testator for legal services. *MATTER OF L. I. L. & T. Co. (IN RE NORTHUP)* 5

See EXECUTOR AND ADMINISTRATOR.

WITNESS — His refusal to answer questions on cross-examination requires the rejection of his testimony in chief — the consent of the party calling him that he be compelled to answer does not alter the rule — effect of the presence of other testimony sufficient to sustain the judgment.

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* *Sic.*

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